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SUPREME COURT, U.S.

Vol. I

(Pages 1 to 579)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952—

No. 262

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 303

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 262—PETITION FOR CERTIORARI FILED AUGUST 7, 1952
NO. 303—PETITION FOR CERTIORARI FILED AUGUST 28, 1952
CERTIORARI GRANTED OCTOBER 20, 1952

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United States Court of Appeals

FOR THE SECOND CIRCUIT.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,

Libelant,

against

UNITED STATES OF AMERICA, and EMORY S. LAND, H. L. VICKERY, THOMAS M. WOODWARD, EDWARD MACAULEY and JOHN M. CARMODY, constituting the UNITED STATES MARITIME COMMISSION, and

EMORY S. LAND, ADMINISTRATOR, WAR SHIPPING ADMINISTRATION,

Respondents.

Ad. 129-295.

Docket Entries.

1944

Feb. 11	Libel filed and citation issued.
Feb. 14	Affidavit of service of libel upon U. S. A. filed.
Feb. 24	Citation with Marshal's return of service on respondents other than United States, filed.
Mar. 7	Letter from Department of Justice, Form C, filed.

1945

Jan. 12	Notice of change of firm name (Kirlin, Campbell, Hickox & Keating) filed.
July 2	Notice of Appearance of U. S. A. filed.

1947

June 11	Affidavit of Continuance filed.
Aug. 9	Order re: Decree Pro Confesso, filed.
Aug. 28	Answer of United States filed.

4 *Docket Entries.*

1948		
Jan.	9	Consent and Order of Discontinuance as against all respondents other than the United States, filed.
1950		
May	3	Pre-trial hearing before Leibell, J. Marked "T. C."
1951		
Jan.	18	Trial begun before Ryan, J. (tried with A. 133-332).
Jan.	19	Trial continued and concluded, decision reserved.
5 Feb.	23	One volume of stenographer's minutes filed (also in A. 133-332).
May	25	Opinion No. 19,367, Ryan J., and Findings of Fact and Conclusions of Law filed. Libelant to recover as indicated (see Opinion) (also in A. 133-332)
		Stenographer's minutes filed.
June	15	Notice of Motion for consolidation with A. 133-332, etc. filed. Respectfully referred to Judge Ryan. (filed in A. 133-332)
June	27	Final Decree filed. Calmar Steamship Corporation to recover from U. S. A. the sum of $238.50
6		with interest in the sum of $70.32. Ryan, J.
Aug.	27	Stipulation and Order filed for one record in the appeal of this case and Ad. 133-332.
Sept.	13	Libelant's Notice of Appeal and Allowance filed (I. R. Kaufman, J.)
Sept.	25	Respondent's Notice of Appeal filed.
Sept.	25	Allowance of Respondent's Notice of Appeal filed (Clancy, J.).
Sept.	25	Respondent's Assignments of Error filed.
Oct.	2	Stipulation and Order re Exhibits to be printed on appeal.
Oct.	17	U. S. Court of Appeals stipulation and order extending time to file record to December 12, 1951.
Oct.	22	Filed libelant's Assignment of Errors.

Docket Entries.

7

UNITED STATES COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, *et al.*,

and

EDINBURGH ASSURANCE CO., LTD., *et al*,

and

EXCESS INSURANCE COMPANY, LIMITED,
Respondents.

Ad. 133-332.

8

1944

Nov. 15 Libel filed.
Nov. 22 Notice of Appearance of respondents filed.
Dec. 4 Letter from Department of Justice—Form "A", filed.

1945

Jan. 12 Notice of change of firm name (Kirlin, Campbell, Hickox & Keating) filed. 9
Dec. 18 Depositions of A. Michelson and J. E. Bullock filed.

1947

July 18 Answer of Sydney Keith Scott, *et al.* filed.

1949

Oct. 28 Order for issuance of a Commission to London, England, filed.
Dec. 2 Cross-interrogatories to Arthur James Whittall, *et al.* filed.
Dec. 5 Stipulation and Order re: objections to interrogatories, etc. filed.
Dec. 13 Direct Interrogatories addressed to Arthur James Whittall, *et al.* filed.
Commission to London, England issued.

10

1950	
Jan. 11	Order amending Commission, filed.
Feb. 28	Commission returned from London, England, filed.
May 2	On Call of Pre-Trial before Leibell, J. Adjourned to May 3, 1950.
May 3	Pre-Trial hearing before Leibell, J.—marked "T. C."
1951	
Jan. 18	Trial before Ryan, J. (tried with A. 129-295)
Jan. 19	Trial continued and concluded. Decision reserved. Ryan, J.
11 Feb. 23	One volume of stenographer's minutes (filed in A. 129-295), filed.
May 25	Opinion No. 19,367—Ryan, J. and Findings of Fact and Conclusions of Law filed. Libelant to recover as indicated (see Opinion) (filed in A. 129-295). Stenographer's minutes filed (filed in A. 129-295).
June 15	Notice of Motion for Consolidation with A. 129-295, etc. filed—Respectfully referred to Judge Ryan for a hearing (filed in A. 129-295).
June 27	Interlocutory decree with reference to John Spallone, as Commissioner. Ryan J.
July 9	Filed Stipulation re findings, etc.
12 July 11	Filed Notice of Appeal from interlocutory decree and allowance (Holtzoff, J.).
July 16	Bill of Costs taxed at the sum of $597.00.
July 20	Filed Order withdrawing appeal from interlocutory decree.
July 20	Final decree filed; libelant to recover the sum of $1,390,471.05 (Holtzoff, J.).
Aug. 27	Stipulation and Order filed for one record in the appeal of this case and Ad. 129-295.
Sept. 20	Stipulation re payment in lieu of supersedeas bond.
Oct. 2	Stipulation and Order re Exhibits to be printed on appeal.
Oct. 15	Filed respondent's Notice of Appeal and Allowance (Ryan, J.); and undertaking.
Oct. 16	Filed respondents' Assignment of Error.
Nov. 23	U. S. Court of Appeals stipulation and order extending time to file record to December 12, 1951.

Libel, Dated February 11, 1944.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,

against

UNITED STATES OF AMERICA, and EMORY S. LAND, H. L. VICKERY, THOMAS M. WOODWARD, EDWARD MACAULEY and JOHN M. CARMODY, constituting the UNITED STATES MARITIME COMMISSION, and

EMORY S. LAND, ADMINISTRATOR, WAR SHIPPING ADMINISTRATION.

Ad. 129-295

In a cause of contract, civil and maritime, alleges on information and belief, as follows:

For a First Cause of Action:

FIRST: At all times hereinafter mentioned libelant was and still is a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, with its principal office and place of business at No. 25 Broadway, Borough of Manhattan, City and State of New York, within this district, and within the jurisdiction of this Honorable Court.

(By consent order, dated January 9, 1948, the above libel was discontinued as against all respondents other than the United States of America.)

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Cross by Mr. Collins 439
Re-direct by Mr. Murphy 440
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Leslie Kingdon Sweet (Marine Underwriter),

Robert Hutchings Whittall (Marine Underwriter),

Noel Ryder Jenkins (Marine Underwriter),

George Christopher Bedwell (Adjuster of Claims),

Harold Halton Mummery (Marine Underwriter),

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LIBELANT'S EXHIBITS.

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1. Particulars of SS. *Portmar*	129	580
2. Certificate of speed of SS. *Portmar* from American Bureau of Shipping, dated April 25, 1944	130	581
3. Time charter of SS. *Portmar* between Calmar Steamship Corporation, owner, and United States Maritime Commission, charterer, as of November 21, 1941	132	18
4. Stipulation of November 1, 1950 between proctors for libelant and proctors for respondents in A. 133-332, containing photostat copies of various documents	134	582
5. Stipulation of November 6, 1950 between proctors for libelant and proctors for respondents in A. 133-332, containing photostat copies of various documents	136	592

	Admitted at Page	Printed at Page
6. War Risk Insurance Policy of Lloyd's underwriters on SS. *Portmar* in the sum of $714,000.00	136	70
7. War Risk Insurance Policy of Institute of London Underwriters' Companies on SS. *Portmar* in the sum of $116,000	136	
8. War Risk Insurance Policy of Excess Insurance Co., Ltd. on SS. *Portmar* in the sum of $30,000	136	
9. Letter: Calmar to B. K. Ogden, Director, Division of Insurance, U. S. M. C., dated November 26, 1941	140	598
10. Letter: B. K. Ogden, Director, Division of Insurance, U. S. M. C., to Calmar, dated February 20, 1942	140	602
11. Shipping Articles of SS. *Portmar*	141	†
12. Cable: Michelson to Calmar, dated April 1, 1942	145	603
13. Telegram: I. M. Holt, War Shipping Administration, to Calmar, dated Feb. 23, 1942	146	603
14. Cable: Michelson to Calmar, dated March 24, 1942	147	604
15. Cable: Michelson to Calmar, dated March 23, 1942	147	604
16. Cable: Calmar to Michelson, dated March 27, 1942	147	605
17. Cable: Malleson, Stewart to Calmar, dated March 30, 1942	147	605

* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

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18. Letter: J. C. Outler, W. S. A., U. S. M. C. to Mr. H. W. Warley of Calmar, dated April 3, 1942	148	606
19. Cable: Calmar to Malleson, Stewart, dated April 7, 1942	148	607
20. Consisting of twenty cables and one letter	150	607
21. Letter: William Radner, General Counsel, W. S. A., to Calmar, dated October 24, 1942	150	622
22. Telegram: W. C. Peet, Jr., to Calmar, dated November 12, 1942, as to requisition of title to SS. *Portmar*	151	624
23. Certificate of requisition of title to possession of SS. *Portmar* by the United States War Shipping Administrator at Brisbane, Queensland, Australia, dated November 17, 1942, signed by H. A. Rettig for U. S. W. S. A.	151	625
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* These Exhibits will be handed up to the Court in a Separate Volume.

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29.	Chart of harbor of Port Darwin with marks made by Captain Michelson	170	*
30.	Receipt dated February 21, 1942, given to Captain Michelson for secret codes by Australian Naval Authorities	171	*
31.	Memorandum: Frank LaRue, Lt. Col., Inf., to Captain Michelson, dated February 26, 1942	171	628
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia	171	†
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John P. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A.B., before United States Vice Consul at Melbourne, dated March 25, 1942	171	*
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	†
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* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

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44.	Letter: Axel Michelson to Malleson, Stewart & Co., dated August 14, 1942	173	635
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† Omitted pursuant to Stipulation printed at page 785.

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B	Authenticated copy of Naval Radio Dispatch to all merchant ships, dated December 7, 1941	180	661

* These Exhibits will be handed up to the Court in a Separate Volume.

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3.	Letter from D. C. Anderson, Underwriter of American Marine Insurance Syndicates to the Policy Form Committee of the Syndicates, dated January 12, 1940, requesting approval of a redrafted Free of British Capture Hull Clause	231	671

* These Exhibits will be handed up to the Court in a Separate Volume.

Master, were returned to the United States. The Master remained in Australia in the interest of the vessel until March 6, 1943.

TENTH: On or about February 22, 1942, salvage services for the raising and restoration of the *Portmar* were commenced by Captain John Protheroe Williams, Managing Director of United Proprietary Limited, incorporated in the State of Victoria, for the purpose of rendering salvage services. Captain Williams was also duly appointed chief salvage officer of the Commonwealth Salvage Board, an
41 agency of the Australian Government created for the purpose of rendering aid in the salvage of vessels in Australian waters. These services, with expert divers and workmen, were diligently prosecuted until on or about the 5th day of April, 1942, when the vessel was floated, and with the aid and assistance of a vessel provided by the local naval authorities was removed to a place of safety.

ELEVENTH: After the *Portmar* was floated she was handed over to the shipping authorities at Darwin, and, pursuant to towage arrangements made between representatives of American Military Authorities and the Com-
42 monwealth Salvage Board, was towed to Brisbane for repairs, where she arrived on July 29, 1942. Surveys and temporary repairs were made as soon as practicable; permanent repairs not being possible, the *Portmar* proceeded to the port of Sydney under her own steam, where she arrived on November 24, 1942.

TWELFTH: The War Shipping Administration requisitioned title to, and took possession of, the *Portmar* effective at 12 o'clock on November 17, 1942, Eastern Australian time. The vessel was then at Brisbane, still in damaged condition, as repair of the damage had not theretofore been possible.

Libel, Dated February 11, 1944.

THIRTEENTH: On February 13, 1943, surveyors representing libelant, respondents and underwriters, after having previously held comprehensive surveys, agreed and reported to all the interested parties that the costs of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February 1942 would amount to £28,000 Australian currency.

FOURTEENTH: Respondents were and are liable under the charter to pay hire on the vessel at the rate provided in the charterparty, as hereinbefore set forth, up to the time of the requisition of title. Hire was paid in full up to the 1st day of March, 1942. No payment of hire in any amount has been thereafter made, but has been refused and still is refused.

FIFTEENTH: By reason of the premises there is due and owing to libelant from respondents the sum of $345,591, no part of which sum has been paid although duly demanded.

For a Second Cause of Action.

SIXTEENTH: Libelant here realleges each and all of the allegations set forth in Articles numbered FIRST to THIRTEENTH of this libel, inclusive, with the same force and effect as if here set forth at length.

SEVENTEENTH: Pursuant to the provisions of Article 2:17 of said charter, libelant took out insurance covering said vessel against war risks for the voyage provided in said charter, in the sum of $860,000 on said vessel valued at $860,000, and the premiums for said insurance were paid by respondent, United States of America.

EIGHTEENTH: The damages suffered by said vessel as aforesaid were of the class covered by said policies, and

due claim for said losses has been made against underwriters on said policies, but said underwriters have denied all liability, and refused payment thereof, on the ground that the *Portmar* was not covered by said policies at the time of the loss.

NINETEENTH: Notwithstanding the requirements of Article 2.17 of said charter, said vessel was required to sail from Port Darwin toward Koepang, Timor, under the direction of the Commander of U. S. S. *Houston* without
47 any notice thereof being given to libelant, and before any opportunity was afforded libelant then to place any new insurance against war risks on said vessel, or any war risk protection and indemnity insurance, if required, and before any such insurance was placed by libelant, all in breach of the provisions of Article 2.17 of said charter.

TWENTIETH: If it should ultimately be determined that by reason of the matters aforesaid said vessel was not covered by the war risk insurance referred to in Article SEVENTEENTH hereof, or by war risk protection and indemnity insurance, then said vessel and libelant were entirely uninsured at the time of said loss against such war risks under
48 any policies of insurance provided by libelant, and respondents were and are liable as insurers of such war risks assumed by them under the provisions of Article 2.17 of said charter.

TWENTY-FIRST: As a result of the damages suffered by said vessel, the death by enemy action of a member of the crew, the cost of salvage, towage, repatriation of crew, Master's expenses and legal and miscellaneous expenses, libelant has sustained damages in the sum of $250,000.

TWENTY-SECOND: By reason of the premises there is due and owing to libelant from respondents, the sum of $250,000, no part of which sum has been paid although duly demanded.

Libel, Dated February 11, 1944. 49

For a Third Cause of Action.

TWENTY-THIRD: Libelant here realleges each and all of the allegations set forth in Articles numbered First to Thirteenth of this libel, inclusive, with the same force and effect as if here set forth at length.

TWENTY-FOURTH: Respondents became and are obligated to indemnify libelant for all losses and liabilities arising from compliance with the orders and directions of the Naval and Military Authorities of the United States, or of 50
any other officers acting for and on behalf of respondents, in ordering said vessel to sail from Port Darwin in convoy and to return to Port Darwin, under circumstances and conditions whereby she was subjected to violent enemy attack and bombardment, in consequence whereof libelant sustained and incurred the damages, losses and expenses alleged in Article Twenty-first hereof, in the sum of $250,000.

TWENTY-FIFTH: By reason of the premises there is due and owing from respondents to libelants the sum of $250,000, no part of which sum has been paid, although 51
duly demanded.

TWENTY-SIXTH: Libelant has duly performed each and all of the terms and conditions of said Charter on its part to be performed.

TWENTY-SEVENTH: As a result of the matters hereinbefore alleged, respondents and each of them are liable to libelant for, and there is now due and owing from respondents and each of them to libelant, the total sum of $595,591, together with interest on the several items composing said sum, no part of which sum has been paid, although duly demanded.

52 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

TWENTY-EIGHTH: All and singular the premises are true and within the Admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that citation in due form of law, according to the rules and practice of this Honorable Court may issue against respondents and each of them, citing them and each of them to appear and answer in the premises; that libelant may have decree against respondents and each of them for its damages with interest as aforesaid, together with costs; and that libelant may have such
53 other and further relief as may be just.

KIRLIN, CAMPBELL, HICKOX, KEATING & MCGRANN,
Proctors for Libelant,
Office and Post Office Address:
120 Broadway,
Borough of Manhattan,
New York 5, N. Y.

(Verified by H. W. Warley, President of Calmar Steamship Corporation, February 11, 1944.)

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Exhibit A, Attached to Libel, Dated February 11, 1944.

Contract MCc-1915

Time Charter.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a

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mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

WITNESSETH:

WHEREAS:

I. The Charterer has determined, pursuant to the provisions of an Act of Congress approved June 6, 1941 (Public Law 101—77th Congress), that vessels in addition to those otherwise available are necessary for transportation of foreign commerce of the United States, or of commodities essential to the national defense;

II. The Charterer deems the terms and conditions hereof and the period of this Charter and the restrictions herein contained to be necessary or desirable for the protection of the public interest and the rate of hire herein provided to be fair and reasonable.

NOW, THEREFORE, the Owner and Charterer agree:

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's dead-

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SECOND: At all times hereinafter mentioned, the United States of America was and still is a sovereign, which, by the Suits in Admiralty Act (approved March 9, 1920; 41 Stat. 525), has consented to be sued in this Honorable Court on the cause of action hereinafter set forth.

THIRD: Emory S. Land, H. L. Vickery, Thomas M. Woodward, Edward Macauley and John M. Carmody are, and were at all times hereinafter mentioned, the duly appointed members of the United States Maritime Com-
17 mission, an agency of the United States of America, created under and pursuant to the Merchant Marine Act, 1936, as amended, and Emory S. Land is the duly appointed Chairman of said Commission.

FOURTH: By Executive Order 9054, dated February 7, 1942, the President of the United States established a War Shipping Administration under the direction of an Administrator, and delegated to the Administrator the following functions and duties, among others:

> "The functions, duties, and powers conferred by law upon the United States Maritime Commission
18 with respect to the operation, purchase, charter, insurance, repair, maintenance, and requisition of vessels, and the issuance of warrants with respect thereto, under the Merchant Marine Act of 1936 as amended, 49 Stat. 1985, Public Law 101 Seventy-Seventh Congress, approved June 6, 1941, and Executive Order 8771 issued pursuant thereto, Public Law 173, Seventy-Seventh Congress, approved July 14, 1941, are hereby transferred to the Administrator;"

and Emory S. Land is the duly appointed Administrator, War Shipping Administration.

FIFTH: As of November 21, 1941, libelant, owner of the SS. *Portmar*, a vessel documented under the laws of the

United States, entered into a charter for said vessel with respondent, United States of America, by respondent, United States Maritime Commission, and with respondent, United States Maritime Commission, which charter said Commission executed under and pursuant to the authority vested in it by the Act of Congress approved June 6, 1941 (Public Law 101—77th Congress). A copy of said charter is hereto attached, marked Exhibit A, and hereby made a part of this libel.

SIXTH: Among other provisions, said charter contained 20
the following provisions pertinent to the causes of action herein alleged:

"PART I.

"ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

"ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated 21
per month or pro rata for any portion thereof. * * *

"ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

"ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port, north of Cape Hatteras. * * *"

PART II.

* * * * * *

"ARTICLE 2.03. The Charterer shall: (except as otherwise specifically provided herein) pay hire for

the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the 23 casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof."

24 . . . . . .

"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel;

. . . . . .

"*Provided*, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and

to prevent loss of time, payment of hire shall not cease because of:

. . . . . .

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused br contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or over-crowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships;"

. . . . . .

"ARTICLE 2.11. . . . The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages. . . .

"The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

. . . . . .

"ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be

made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity insurance, for the benefit of the 29 Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated.

"The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

* * * * * *

"ARTICLE 2.27. The Master and the Vessel shall 30 have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however,* that whenever any such

orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable, apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing 32
proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

SEVENTH: On November 28, 1941, pursuant to said charter said SS. *Portmar,* being then seaworthy in all respects and fit for the voyage called for by said charter, sailed from San Francisco, with a cargo of military supplies and equipment, bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the 12th United States Naval District to proceed to Suva, Fiji Islands, there to 33
await orders from the British Naval authorities. On arrival at Suva, the Master of the *Portmar* reported to the British Naval Control Officer, and on December 22, 1941 was ordered by said British Naval Control Officer to proceed to Sydney, Australia. The *Portmar* arrived at Sydney on December 30, 1941, and her Master there reported to the Australian Naval Control Officer, who ordered the vessel to proceed to Brisbane and there discharge part of her cargo. The *Portmar* arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer, who ordered the *Portmar* to proceed to Port Darwin with the remainder of the cargo. The *Portmar* arrived at Port Darwin on January 19th and

her Master there reported to the Australian Naval Control Officer, who ordered the *Portmar* to discharge the remainder of the cargo so soon as a berth at the jetty was available. Pursuant to said order the *Portmar* remained at anchor for several days awaiting berth, and then moved into berth and discharged the remainder of her cargo, except 1500 drums of gasoline which her Master was ordered by the Australian Naval Control Officer to retain on board. The Master was next ordered by the Australian Naval Control Officer at Port Darwin to reload 500 drums which
35 had been discharged, and to proceed to Wyndham, Western Australia, to discharge all the drums on board and return to Port Darwin. Pursuant to said order the *Portmar* sailed from Port Darwin on February 4, 1942 and on February 8, 1942 arrived at Wyndham. The *Portmar* there discharged all cargo on board, and then pursuant to orders as above stated returned to Port Darwin, arriving there on February 12, 1942.

EIGHTH: At 1:00 A. M. on February 13, 1942, the Australian Naval Control Officer ordered the *Portmar* to berth at daylight, and on the 13th and 14th the *Portmar*, pursuant to orders given by military authorities of the
36 United States, and (with the cooperation of) the Australian Naval Control Officer, loaded military equipment, stores and troops, including approximately 300 officers and men of the 148th United States Field Artillery Regiment. At about 9:30 P. M. on February 14th the Master was ordered by the Australian Naval Control Officer to report on board the *U. S. S. Houston*, and there received orders from the Commanding Officer of the *U. S. S. Houston* and from the Australian Naval Control Officer to proceed in convoy under the former's command. At 1:30 A. M. on February 15th, the *Portmar* left Port Darwin in convoy with other vessels under the command of the Commanding Officer of the *U. S. S. Houston*, and proceeded towards Koepang, Timor.

NINTH: On February 15th and 16th the convoy was attacked by enemy bombers, and suffered damage. In consequence thereof, the convoy was ordered to and did return to Port Darwin, arriving there about noon, February 18th, 1942. At about 9:55 A. M. on February 19th an aerial attack was made by enemy bombers on the harbor of Port Darwin, and in such attack the *Portmar* sustained such extensive damage, both on deck and below, that the ship began to take in water through perforations in the hull. Both standard and steering compasses were put out of action by reason of damages sustained in the aerial attack. Fire broke out in No. 4 and 5 holds, but was brought under control. Being unable to keep the water down by pumping, and as the ship was taking a severe list, the Master decided to beach the vessel. While searching for an advantageous place, having no compass to assist in navigation, the *Portmar* ran aground at 2:12 P. M. on February 19th, 1942, on the starboard side from amidships to stern on the south side of a small cove south of Channel Island in about 11 or 12 feet of water. Efforts were made to plug holes in the hull made by bomb fragments and aerial fire, but the water in the vessel increased, until she took a list of about 40°, and the Master, in view of the danger of capsizing, gave orders for the crew to leave the ship. The members of the crew were removed, but the Master with three members stood by the vessel until February 21st, at which time the after decks were completely submerged at high tide. On that day the Master ordered the starboard anchor lowered in order to hold the ship in case of a high rise of the tide.

On February 23rd the Master returned to the vessel and remained on board over-night and on February 24th. Again on March 2nd and 3rd the Master returned to the vessel and found that she had settled further by the stern, until the water completely covered the poop deck. Thereafter the Master, officers and crew were sent overland across Australia to Melbourne, where they arrived at Melbourne on March 22, 1942. Later the officers and crew, except the

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thereof, if required, and hire shall be suspended for any resulting loss of time. Any and all overtime or additional compensation based upon the nature of the work done, whether in port or at sea, payable to the Vessel's personnel, by reason of the Charterer's orders or operations, shall be paid by the Charterer at rates stated in the Vessel's Articles or collective bargaining agreements.

ARTICLE 2.15. All bills of lading issued hereunder shall contain, directly or by reference, the following clauses:

89 (i) *Clause Paramount*

"This bill of lading shall have effect subject to the provisions of the Carriage of Goods by Sea Act of the United States, approved April 16, 1936, which shall be deemed to be incorporated herein, and nothing herein contained shall be deemed a surrender by the carrier of any of its rights or immunities or an increase of any of its responsibilities or liabilities under said Act. If any term of this bill of lading be repugnant to said Act to any extent, such term shall be void to that extent but no further."

90 (ii) *Both-to-Blame Collision Clause*

"If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carry-

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ing ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or carrier."

(iii) *General Average Clause*

"General average shall be adjusted, stated and settled, according to Rules 1 to 15, inclusive, 17 to 22, inclusive, and Rule F of York-Antwerp Rules 1924, at such port or place in the United States as may be selected by the carrier, and as to matters not 92
provided for by these Rules, according to the laws and usages at the port of New York. In such adjustment, disbursements in foreign currencies shall be exchanged into United States money at the rate prevailing on the dates made and allowances for damage to cargo claimed in foreign currency shall be converted at the rate prevailing on the last day of discharge at the port or place of final discharge of such damaged cargo from the ship. Average agreement or bond and such additional security, as may be required by the carrier, must be furnished before delivery of the goods. 93
Such cash deposit as the carrier or his agents may deem sufficient as additional security for the contribution of the goods and for any salvage and special charges thereon, shall, if required, be made by the goods, shippers, consignees or owners of the goods to the carrier before delivery. Such deposit shall at the option of the carrier, be payable in United States money, and be remitted to the adjuster. When so remitted the deposit shall be held in a special account at the place of adjustment in the name of the adjuster pending settlement of the general average and refunds or credit balances, if any, shall be paid in United States money."

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weight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. The Owner shall not be obliged, however, to provide any accommoda-
59 tions beyond such as may be available on delivery of the Vessel. The Owner will victual pilots free of charge. All monies, except hire, accruing in any month in favor of the Owner under any provision of this Charter (including such victualling) shall be payable on the first day of the next succeeding calendar month.

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port,
60 north of Cape Hatteras. Notice of redelivery pursuant to ARTICLE 2.03 shall be given 15 days in advance.

ARTICLE 1.05. This Charter consists of this PART I and of PART II annexed hereto as Exhibit A. Unless in this PART I otherwise provided, all of the provisions of said PART II shall be part of this Charter as though fully incorporated herein.

ARTICLE 1.06. *Special Provisions.*

(a) The Charterer shall reimburse the Owner for its actual out-of-pocket expenses for any war bonuses, extra wages based on the areas to be transversed during, or the ports of call of, the voyage and extra wages arising out of

the nature of any cargo carried hereunder, where such bonuses and extra wages are payable by the Owner to the Master, officers or crew in accordance with ship's articles or Owner's collective bargaining agreements.

(b) The Charterer shall also reimburse the Owner for all wages and bonuses of whatsoever kind payable by the Owner for any additional members of the Vessel's complement above the normal complement, if employment of such additional complement by the Owner becomes necessary as a result of the Vessel's service under this Charter or in order to provide for the extra personnel referred to in ARTICLE 1.02 of this Charter. 62

IN WITNESS WHEREOF, the parties hereto have executed this Agreement in triplicate the day and year first above written.

CALMAR STEAMSHIP CORPORATION

By: H. W. WARLEY
President

(SEAL)

Attest:

MARK R. KREIDLER
Secretary 63

UNITED STATES MARITIME COMMISSION

By: E. S. LAND
Chairman

(SEAL)

Attest:

W. C. PEET, JR.
Secretary

Approved as to form:

FRANCIS B. GOERTNER
Assistant General Counsel
G. J. H.

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(Rev. XI. 13.41.)
T. C. Cargo
Government

PART II.

Exhibit A attached to Time Charter by United States Maritime Commission known as Contract 1915.

ARTICLE 2.01. The Vessel shall be placed at the disposal of the Charterer at the port of delivery at such safe ready
65 dock, wharf or place as the Charterer may direct. Any time lost by the Vessel awaiting the availability of such dock, wharf or place shall count as time on hire. The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, having water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. The Vessel shall be employed in carrying
66 lawful merchandise, including petroleum or its products in proper containers, between safe ports or places, in lawful trades within the trading limits of this Charter, as the Charterer or its agents shall direct.

ARTICLE 2.02. The whole reach and burthen of the Vessel's holds, decks, and usual places of loading (but not more than she can reasonably stow and carry), shall be at the Charterer's disposal, reserving only space proper and sufficient in the opinion of the Master for Vessel's officers and crew, Master's cabin, tackle, apparel, furniture, provisions, fresh water, stores and fuel.

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of

the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. 68
Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof. Unless otherwise provided in PART I hereof, the Charterer shall give the Owner not less than seven days' notice in writing of the Vessel's expected date and port of redelivery.

Cash for the Vessel's ordinary disbursements at any 69
port may be advanced as required by the Master, by the Charterer or its agents, and such advances shall be deducted from the hire. The Charterer shall not, however, be responsible for the application of such advances.

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or

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(b) because of breach of orders or neglect of duty by the Master, officers or crew, or deviation to land any injured or ill person on board (except the additional personnel provided for in PART I hereof or any other person carried at the Charterer's written request or any person whose illness or injury is caused or contributed to by the war conditions listed in (ii) below)

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise
71 due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

(i) a deficiency of men arising from nonavailability of or difficulty in obtaining men for the Vessel's intended voyage, including difficulty caused by any demand for additional compensation based on the areas to be traversed during or the ports of call of such voyage, or based on other conditions connected with the intended voyage;

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused
72 or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or

(iii) time lost (when the Vessel needs repairs necessary to her working) (1) due to a lack of available repair facilities in a port outside the continental

United States, or (2) due to the Vessel's having to leave a port outside the continental United States to go to another port for such repairs when the facilities for such repairs at the port so left would not have been available in the time required to proceed to and return from such other port; Provided, that this clause (iii) shall not affect any other provisions in this Charter as to the stoppage of hire while repairs are in progress.

The cost of fuel and water consumed while the Vessel 74
is off hire hereunder, as well as all port charges, pilotages and other expenses incurred during such period and consequent upon the putting into any port or place other than that to which the Vessel is bound, shall be borne by the Owner; but should the Vessel be delayed or driven into port or to anchorage by stress of weather or on account of accident to or other consideration for her cargo, such delay, departure, or loss of time, shall be for Charterer's account. Cleaning of boilers and overhauling of machinery whenever possible shall be done during service, but if impossible and without limiting other provisions of this Article, the Charterer shall give the Owner forty-eight hours in any two months for such work, which, at Charterer's 75
option, may be given in one period of forty-eight consecutive hours; should the vessel be further detained by reason of such cleaning of boilers or overhauling of machinery, hire shall cease for the time lost by such further detention. Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (except as herein otherwise

provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel.

ARTICLE 2.06. The Charterer shall (except as herein otherwise provided) provide and pay for: all fuel (except for cooking) 75% of all fresh water (except water ballast) if the Vessel is a steamer, or 25% if a motorship; all port charges, pilotages, light, dock, canal and other dues, steve-
77 doring, agencies, commissions, reasonable ballast, (except water ballast, and the cost of loading and discharging it); tug assistance and boating where incurred for the Charterer's business, and all other charges and expenses whatsoever except those which, by the terms of this Charter, are specifically made payable by the Owner.

Fumigations ordered because of illness of the crew shall be for the Owner's account. Fumigations ordered because of cargoes carried or ports visited while the Vessel is employed under this Charter shall be for the Charterer's account.

The Charterer shall provide necessary dunnage and shifting boards, also any extra fittings requisite for a spe-
78 cial trade or for the carriage of livestock or other unusual cargo, but the Owner shall allow the Charterer the use of any dunnage and shifting boards already aboard the Vessel. The Charterer shall have the privilege of using shifting boards for dunnage. The Charterer shall make good any damage to or shortage of shifting boards on board at delivery.

ARTICLE 2.07. The Charterer shall pay for 75%, if a steamer, or 25% if a motorship, of all fresh water in the Vessel's service tanks, and for all fuel in the Vessel's bunkers, upon delivery, and the Owner shall pay for 75% if a steamer, or 25% if a motorship, of all fresh water in the Vessel's service tanks, and for all fuel in the Vessel's

bunkers on redelivery, at current market prices of the ports of delivery and redelivery respectively.

ARTICLE 2.08. The Charterer shall be at liberty to install any equipment and make alterations and additions to quarters and equipment incident to the service in which the Vessel is to be used, and to install any additional gear or equipment for loading or discharging cargo beyond that on board at the beginning of this Charter. Such work shall be done at Charterer's expense and on its time, and shall not be such as to affect the seaworthiness of the Vessel or 80
the safety of the crew, or as to be in contravention of any applicable law of the United States or regulation made pursuant thereto. Such equipment, materials, and gear so fitted are to be considered Charterer's property; and the Charterer shall remove the same at its expense before redelivery, and shall restore the Vessel to her condition prior to such changes (ordinary wear and tear excepted).

ARTICLE 2.09. The Owner agrees at its expense to drydock the vessel, to clean and paint her bottom, at intervals of about every eight months and not less often than once every twelve months, unless the Charterer otherwise agrees, 81
and, when due, the Charterer agrees to send the Vessel to a port where she can so drydock and paint. In case of drydocking pursuant to this ARTICLE at a port where the Vessel is sent by the Charterer on its business, hire shall be suspended from the time the Vessel receives free pratique on arrival, if without cargo, or on completion of discharge of cargo, if she arrives loaded, until the Vessel is again ready for service. If the Owner sends the Vessel to a port (other than one designated by the Charterer) for such drydocking, hire shall be suspended from the time of the Vessel's arrival there at the sea buoy inbound until her departure from the sea buoy outbound. Hire shall not be suspended in either case for any time lost by the Vessel because of unavailability of drydock resulting from causes

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beyond the control of the Owner. All towage, pilotage, and other expenses incidental to the drydocking, and all port charges incurred and fuel and water consumed (to the extent such fresh water is to be provided or paid for by the Charterer) while hire is suspended as provided in this ARTICLE, shall be for the Owner's account.

ARTICLE 2.10. The Charterer shall furnish the Master from time to time with all requisite instructions and sailing directions, in writing, and the Master shall keep a full and correct log of the voyage or voyages, which shall be patent
83 to the Charterer or its Agents, and furnish the Charterer or its Agents, when required, with a true copy of daily logs, showing the course of the Vessel and distance run and the consumption of fuel.

ARTICLE 2.11. Subject always to the direction of the Charterer, the Master shall prosecute his voyages with the utmost dispatch and shall render all customary assistance with Ship's crew and boats; and shall use due diligence in caring for and ventilating the cargo. The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency,
84 and prosecution of the voyages; and Charterer shall load, stow, trim and discharge the cargo at its expense under the supervision of the Master, who is to sign bills of lading for cargo as presented, in conformity with Mate's or Tally Clerk's receipts. The Master, officers and crew of the Vessel in supervising loading, stowing, trimming, tallying and discharging, shall be deemed the agents of the Charterer, except in so far as such supervision pertains to the safety of the Vessel. Bills of lading are to be signed at any rate of freight that Charterer or its agents may direct, without prejudice to this Charter. The Charterer hereby agrees to indemnify the Owner against all consequences or liabilities that may arise from the Charterer or its agents (including the Master) signing bills of lading or other documents incon-

sistent with this Charter, or from any irregularities in papers supplied by the Charterer or its agents. 85

The Charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter.

ARTICLE 2.12. Cargo may be laden or discharged in any dock or at any wharf or place that the Charterer or its agents may direct, provided that the Vessel can safely lie afloat at any time of tide. 86

The Vessel shall not be required to enter any ice-bound port or any port where there is risk that in the ordinary course of things the Vessel will not be able, because of ice, to enter the port safely or to get out after loading or discharging.

ARTICLE 2.13. The Owner shall provide and maintain gear for all derricks, which gear shall be capable of handling lifts up to the weight set forth in the preamble of this Charter, but heavier lifts shall be at Charterer's expense and responsibility. The Owner shall maintain the gear of the ship as fitted, and shall also provide ropes, falls and 87 blocks. The Owner shall also provide on the Vessel lanterns and oil for night work, and give the use of electric lights when the Vessel is so fitted. The Charterer shall have the use of any gear on board the Vessel, including slings.

ARTICLE 2.14. The Vessel shall work night and day, if required by the Charterer, and all winches to be at the Charterer's disposal during loading and discharging. Shore winchmen, where necessary, shall be provided and paid by the Charterer. In the event of a disabled winch or winches or insufficient power to operate winches unless resulting from causes specified under ARTICLE 2.04 (ii) hereof, the Owner shall pay for a shore engine, or engines, in lieu

94 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

(iv) *Amended "Jason" Clause*

"In the event of accident, danger, damage, or disaster before or after commencement of the voyage resulting from any cause whatsoever, whether due to negligence or not, for which or for the consequence of which the carrier is not responsible by statute, contract, or otherwise, the goods, shippers, consignees, or owners of the goods shall contribute with the carrier in general average to the payment of any sacrifices, losses or expenses of a
95 general average nature that may be made or incurred, and shall pay salvage and special charges incurred in respect of the goods. If a salving ship is owned or operated by the carrier, salvage shall be paid for as fully as if the salving ship or ships belong to strangers.

(v) *War Clauses*

"In any situation whatsoever or wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the carrier or master is
96 likely to give rise to capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge or the usual place of discharge in such port the master, whether or not proceeding toward or entering or attempting to enter the port of discharge or reaching or attempting to reach the usual place of discharge therein or attempting to discharge the goods there, may, without giving any prior notice, discharge the

goods into depot, lazarette, craft, or other place and the goods shall be liable for any extra expense thereby incurred; or the master may proceed or return, directly or indirectly, to or stop at such other port or place whatsoever as he or the carrier may consider safe or advisable under the circumstances, and discharge the goods or any part thereof there without giving any prior notice, and when landed as hereinabove provided, the goods shall be at their own risk and expense, the delivery thereof by the carrier shall be considered complete 98
and the carrier shall be freed from any further responsibility in respect thereof except to mail notice of the disposition of the goods directed to the shipper or consignee named in this bill of lading at such address as may be stated herein; or the master may retain the cargo on board until the return trip or until such time as he or the carrier thinks advisable; or the master may forward the goods by any means by water or by land, or by both such means, at the risk and expense of the goods. For any services rendered to the goods as hereinabove provided, the carrier shall be entitled to a reasonable extra compensation. 99

The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the

contract voyage. The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy."

ARTICLE 2.16. The Vessel, her Master and Owner, shall not unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder, arising or resulting from: any act, neglect, default or barratry of the Master, pilots, mariners or other servants of the Owner in the navigation or management of the Vessel; fire, unless caused by the personal design or neglect of the Owner; collision, stranding, or peril, danger or accident of the sea or other navigable waters; saving or attempting to save life or property; wastage in weight or bulk, or any other loss or damage arising from inherent defect, quality or vice of the cargo; any act or omission of the Charterer, the owner, shipper or consignee of the cargo, their agents or representatives; insufficiency of packing, insufficiency or inadequacy of marks; explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, equipment or machinery; unseaworthiness of the Vessel unless caused by want of due diligence on the part of the Owner to make the Vessel seaworthy or to have her properly manned, equipped and supplied; or from any other cause of whatsoever kind arising without the actual fault or privity of the Owner. And neither the Vessel, her master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, pirates, or assailing thieves; arrest or restraint of princes, rulers or people, or seizure under legal process; strike or lockout or stoppage or restraint of labor from whatever cause, either partial or general; or riot or civil commotion. The Vessel shall have liberty to sail with or without pilots, to tow or to be towed,

to go to the assistance of vessels in distress and to deviate for the purpose of saving life or property or of landing any ill or injured person on board. No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter.

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent 104
voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity 105
insurance, for the benefit of the Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated.

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

ARTICLE 2.18. All salvage moneys earned by the Vessel shall be divided equally between the Owner and the Charterer, after deducting Master's, officers' and crew's share,

106 *Exhibit A, Attached to Libel, Dated February 11, 1944.*

legal expenses, hire of the Vessel during time lost, value of fuel consumed, repairs of damage, if any, and any other extraordinary loss or expense sustained as a result of the service, which shall always be a first charge on such monies.

General average, if any, shall be stated, settled and adjusted at such port or place in the United States as may be selected by the Owner, and in other respects in the manner provided for in Clause (iii) of Article 2.15 hereof. General average adjusters shall be appointed by the Owner,
107 from a list of adjusters satisfactory to the Charterer, and shall attend to the settlement and collection of the general average, subject to customary charges. If the Vessel should put into a port of distress or be under average, she is to be consigned to the Owner's agents who shall be satisfactory to the Charterer and shall be entitled to receive the usual charges and commissions.

ARTICLE 2.19. If the Charterer shall have reason to be dissatisfied with the conduct of the Master, Officers, or any member of the crew, the Owner shall, on receiving particulars of the complaint, investigate and make any changes necessary in the appointments.

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ARTICLE 2.20. Any provisions of this Charter to the contrary notwithstanding, the Owner shall have the benefit of all limitations of, and exemptions from, liability accorded to the Owner of vessels by any statute or rule of law for the time being in force.

ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer.

ARTICLE 2.22. Penalty for non-performance of this contract shall be proved damages.

ARTICLE 2.23. The Charterer shall have the option of subletting or assigning this Charter, but the Charterer shall

always remain responsible for the due fulfillment of this Charter in all its terms and conditions.

ARTICLE 2.24. The Charterer shall have a lien on the Vessel for all monies paid in advance and not earned.

ARTICLE 2.25. No member of or delegate to the Congress, nor Resident Commissioner, shall be admitted to any share or part of this Charter or to any benefit that may arise therefrom, except as provided in Section 116 of the Act approved March 4, 1909. 110

ARTICLE 2.26. The Charterer (except as to matters affecting only the stability of the Vessel) shall be exclusively responsible for proper loading, stowage and discharge of goods of an inflammable, explosive or dangerous nature, and shall comply with all applicable regulations and furnish any necessary fittings.

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department 111 thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however*, that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable,

apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo.

Answer.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Ad. 129-296.

The Answer of the Respondents United States of America, Emory S. Land, H. L. Vickery, Thomas M. Woodward, Edward Macauley and John M. Carmody, to the Libel and Complaint of Calmar Steamship Corporation, in an alleged cause of contract, civil and maritime, alleges:

To the First Cause of Action:

FIRST: On information and belief, respondents admit the allegations contained in Article First.

SECOND: On information and belief, respondents admit that at all the times mentioned in the libel, the United States of America was and still is a sovereign. They deny the remaining allegations of Article Second.

THIRD: Respondents admit that the individual respondents were at all the times mentioned in the libel, the duly appointed members of the United States Maritime Com-

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mission, as therein alleged, and that respondent Emory S. Land was the duly appointed Chairman of said Commission. Respondents deny the remaining allegations of Article Third, and expressly deny that the individual respondents are subject to suit herein.

FOURTH: On information and belief, respondents admit the allegations of Article Fourth, except that they deny that respondent Emory S. Land still is the duly appointed Administrator, and further allege that pursuant to law, the War Shipping Administration has ceased to exist.

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FIFTH: On information and belief, respondents admit the allegations of Article Fifth.

SIXTH: On information and belief, respondents admit the allegations of Article Sixth.

SEVENTH: On information and belief, respondents admit the allegations of Article Seventh, except that they deny knowledge or information sufficient to form a belief as to the orders given to the *Portmar* to proceed to Suva, Fiji Islands, and except, further, that respondents admit that the vessel was thus ordered to proceed by a competent military or naval authority.

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EIGHTH: On information and belief, respondents admit the allegations of Article Eighth.

NINTH: On information and belief, respondents admit that on February 15th and 16th the convoy was attacked by enemy bombers, but deny that the *Portmar* then suffered damage. Respondents further admit that an aerial attack was made by enemy bombers on the harbor of Port Darwin, on February 19th, and that the *Portmar* sustained damage, and that she afterwards, in the course of efforts by the master to beach the vessel, ran aground, and that the master and crew of the vessel abandoned her. Respondents deny that they have any knowledge or information sufficient to form a belief as to the remaining allegations of Article Ninth.

118 *Answer.*

TENTH: On information and belief, respondents admit the allegations of Article Tenth.

ELEVENTH: Respondents admit that after the *Portmar* was floated, she was towed to Brisbane for repairs, pursuant to towage arrangements made between the American military authorities and Commonwealth Salvage Board, and that she arrived there on July 29, 1942. Respondents further admit that she thereafter proceeded to the port of Sydney under her own steam, where she arrived on November 24, 1942. Respondents deny the remaining allegations
119 of Article Eleventh.

TWELFTH: On information and belief, respondents admit that the War Shipping Administration requisitioned title to, and took possession of the *Portmar* effective at 12:00 o'clock on November 17, 1942 Eastern Australian Time, while the vessel was then at Brisbane, and still in a damaged condition. Respondents deny the remaining allegations of Article Twelfth.

THIRTEENTH: Respondents deny the allegations contained in Article Thirteenth, except that they admit that on or about February 13, 1943 a survey of the SS. *Portmar*
120 was held at which respondents were represented.

FOURTEENTH: On information and belief, respondents admit that hire was paid in full up to the 1st day of March, 1942, but allege that no hire was due for the said vessel subsequent to February 19, 1942, and that payment for the period from February 20 to March 1, 1942 was due to errors of fact and law on the part of respondents' representatives and not binding on the respondents. Respondents admit that no payment of hire in any amount has thereafter been made, but has been and still is refused, Respondents deny the remaining allegations of Article Fourteenth.

FIFTEENTH: On information and belief, respondents deny the allegations of Article Fifteenth, except that they admit that no part of the sum of $345,591.00 has been paid.

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Further Answering and as a First Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege, on Information and Belief:

SIXTEENTH: Libellant, after the bombing of the *Portmar* at Port Darwin on February 19, 1942, failed to exercise due diligence to keep the vessel working and to prevent loss of time, in that, among other things, the master and crew of the *Portmar* abandoned the vessel without just cause. As a result, the vessel was looted by persons who obtained access to her in her abandoned condition and stripped of a great quantity of equipment, including all navigation instruments and all other equipment necessary to the operation of the *Portmar* as a merchant vessel. The master, officers and crew of the *Portmar* further failed to take any measures whatever to salvage the vessel and restore her to a condition for further service under the charter.

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SEVENTEENTH: By reason of the foregoing, respondents are not liable for any charter hire subsequent to the bombing of the vessel on February 19, 1942.

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Further Answering and as a Second Separate and Complete Defense to the Libellant's First Alleged Cause of Action, Respondents Further Allege, on Information and Belief:

EIGHTEENTH: Respondents repeat the allegations of Articles Sixteenth and Seventeenth hereof, with the same force and effect as if here set forth at length.

NINETEENTH: By reason of the bombing of the vessel and the subsequent looting and stripping of the vessel after she was abandoned by her master, officers and crew, the *Portmar* ceased to be and lost her character as a merchant vessel for which she was chartered to the respondent United States of America, and respondents are therefore not liable for charter hire beyond February 19, 1942.

124 *Answer.*

Further Answering and as a Third Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege:

TWENTIETH: In the event that the Court should conclude, contrary to the contentions of respondents as set forth in Articles Sixteenth to Nineteenth of this Answer, that the owner of the *Portmar*, her master, officers and crew did not fail to use due diligence to keep the vessel working and to prevent loss of time, respondents alternatively allege that as a result of the bombing of the *Portmar* on
125 February 19, 1942 and the conditions then prevailing at Port Darwin, the *Portmar* became and was a constructive total loss and, under the provisions of Article 2.03 of the charter, respondents are not liable for charter hire subsequent to February 19, 1942.

For a Fourth Separate and Complete Defense to Libellant's First Alleged Cause of Action, Respondents Further Allege:

TWENTY-FIRST: Subsequent to the bombing of the *Portmar*, the possession and complete control of the vessel was
126 taken over by the military authorities of the United States of America for the use of the vessel in the prosecution of the war, and as a result thereof, the charter agreement between the United States of America and libellant was brought to an end and frustrated.

To the Second Cause of Action:

TWENTY-SECOND: Respondents reallege their admissions and denials with respect to Articles First to Thirteenth of the libel, as realleged in Article Sixteenth of the libel, with the same force and effect as if here set forth at length.

TWENTY-THIRD: On information and belief, respondents admit the allegations of Article Seventeenth.

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TWENTY-FOURTH: On information and belief, respondents admit the allegations of Article Eighteenth.

TWENTY-FIFTH: On information and belief, respondents admit that the vessel was required to sail from Port Darwin toward Koepang, Timor, under the direction of the Commander of the USS. *Houston*. Respondents deny that they have any knowledge or information sufficient to form a belief as to whether libellant then had any opportunity to place any new insurance on said vessel. Respondents deny the remaining allegations of Article Nineteenth.

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TWENTY-SIXTH: On information and belief, respondents deny the allegations of Article Twentieth.

TWENTY-SEVENTH: On information and belief, respondents deny the allegations of Article Twenty-first.

TWENTY-EIGHTH: On information and belief, respondents deny the allegations of Article Twenty-second.

To the Third Cause of Action:

TWENTY-NINTH: Respondents repeat the admissions and denials with respect to Articles First to Thirteenth of the libel, inclusive, as realleged in Article Twenty-third of the libel, with the same force and effect as if here set forth at length.

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THIRTIETH: On information and belief, respondents deny the allegations of Article Twenty-fourth, except that they admit that when the vessel was ordered to sail from Port Darwin in convoy and to return to Port Darwin she was subjected to violent enemy attack and bombardment and that libellant sustained and incurred damage. Respondents specifically deny that the orders and directions of the naval and military authorities were or are binding on these respondents.

THIRTY-FIRST: On information and belief, respondents deny the allegations of Article Twenty-fifth.

130 *Answer.*

THIRTY-SECOND: On information and belief, respondents deny the allegations of Article Twenty-sixth.

THIRTY-THIRD: On information and belief, respondents deny the allegations of Article Twenty-seventh.

THIRTY-FOURTH: On information and belief, respondents deny the allegations of Article Twenty-eighth.

Further Answering, and as a Set-off Against Any Amounts Which Libellant May Be Entitled to Recover on Account of the Matters Alleged in the
131 *Libel, Respondents Further Allege, on Information and Belief:*

THIRTY-FIFTH: Respondents repeat the allegations of the foregoing articles of this Answer with the same force and effect as if hereafter set forth at length.

THIRTY-SIXTH: Any payments made to libellant as alleged in Article Fourteenth of the libel, for the period of February 20 to March 1, 1942, were due to errors of fact and law and are not binding upon the respondents.

WHEREFORE, respondents pray that the libel herein may
132 be dismissed with costs, and that respondents may have such other and further relief as to the Court may seem proper.

JOHN F. X. MCGOHEY,
United States Attorney,
Proctor for Respondents,
Office and P. O. Address:
45 Broadway,
Borough of Manhattan,
City of New York.

Libel, Dated November 10, 1944.

133

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

The libel and complaint of CALMAR STEAMSHIP CORPORATION, a Delaware corporation, libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters, 134

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters, 135

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

A133-332.

In a cause of Contract and War Risk Insurance, civil and maritime, alleges on information and belief as follows:

For a First Cause of Action:

FIRST: At all times hereinafter mentioned, libelant was and still is a corporation duly organized and existing under

136 *Libel, Dated November 10, 1944.*

and by virtue of the laws of the State of Delaware, with its principal office and place of business at 25 Broadway, Borough of Manhattan, City and State of New York, within this District and within the jurisdiction of this Honorable Court, and was the owner of the Steamship *Portmar*, a vessel registered under the laws of the United States.

SECOND: At all times hereinafter mentioned SS. *Portmar* was a single screw ocean cargo steamship of 8600 tons deadweight capacity, built in 1919, and until the casualties hereinafter described maintained by libelant in Class
137 ✠ 100 A-1 with Lloyds Register of Shipping. Her tonnage was gross 5551; net 3418. Her dimensions were: length, 409.8′; beam, 54.2′; depth, 27.7′. She was equipped with triple expansion three-cylinder engines and was manned, victualed, supplied, operated and navigated by libelant.

THIRD: As of November 21, 1941, libelant chartered said SS. *Portmar* to the United States of America, by and through the United States Maritime Commission, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports. Said
138 charter, which will be produced at the trial, contained among others, the following provisions:

> "ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions any-

thing is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however,* that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable, apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

FOURTH: On or about January 19, 1942, in London, England, respondent Sydney Keith Scott and other Underwriting Members of Lloyds, London, who are Members of Syndicates, Subscribers to Policy No. D41/11356, a copy of which is hereto attached, marked Schedule A and hereby made a part of this libel, and whose names and Definitive Numbers of Syndicates are set forth in said policy, and who have agreed to abide by the result of this litigation, issued said policy and caused libelant to be insured in the amount of Seven Hundred and Fourteen Thousand United States Dollars ($714,000), upon among other things, the hull, machinery, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar,* lost or not lost, valued at Eight Hundred and Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands,

whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, strikes, riots and civil commotions as per American Form attached to said policy.

FIFTH: On or about January 19, 1942, in London, England, respondents, Edinburgh Assurance Co. Ltd., Northern Maritime Insurance Co. Ltd., Fine Art & General Insurance Co. Ltd., British Law Insurance Co. Ltd., Planet Assurance Co. Ltd., Elders Insurance Co. Ltd. and National
143 Provincial Insurance Co. Ltd., said respondents being Members of the Institute of London Underwriters, subscribers to a policy also bearing No. D41/11356, and whose names and proportions are set forth in said policy, and who have agreed to abide by the result of this litigation, issued said policy in form similar in all material respects to that alleged in Article FOURTH hereof and thereby caused libelant to be insured in the amount of One Hundred Sixteen Thousand United States Dollars ($116,000) upon among other things, the hull, machinery, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar,* lost or not lost, valued at Eight Hundred and
144 Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, strikes, riots and civil commotions as per American Form attached. Said policy will be produced at the trial.

SIXTH: On or about January 19, 1942 in London, England, respondent, Excess Insurance Company Limited, subscriber to Policy also bearing number D41/11356, and which has agreed to abide by the results of this litigation, issued said policy in form similar in all material respects to that

alleged in Article FOURTH hereof, and thereby caused libelant to be insured in the amount of Thirty Thousand United States Dollars ($30,000) upon, among other things, the body, tackle, apparel, ordnance, munition, artillery, boat and other furniture of said Steamship *Portmar*, lost or not lost, valued at Eight Hundred and Sixty Thousand United States Dollars ($860,000), at and from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival, only against the risks of war, 146
strikes, riots and civil commotion as per American Form attached. Said policy will be produced at the trial.

SEVENTH: Said policies, described in Articles FOURTH, FIFTH and SIXTH hereof, contained among other things, the following provisions:

> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, * * * and of all other like perils, Losses, and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any 147
> part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. * * *"
>
> * * * * * * *
>
> "Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found."
>
> * * * * * * *

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"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."

149 "F. C. & S. CLAUSE

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or
150 civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions

or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

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WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines 153 and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old.

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The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

* * * * * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

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Libelant reserves the right to refer to any and all of the provisions of said policies in addition to those set forth above, as same may become relevant or material to the issues of this cause.

EIGHTH: On November 28, 1941, pursuant to said charter the *Portmar,* being then seaworthy in all respects and fit for the voyage called for by said charter, sailed from San Francisco, with a cargo of military supplies and equipment, bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the Twelfth United States Naval
156 District to put in to Suva, Fiji Islands, there to await orders from the British Naval authorities. The Master of the *Portmar* obeyed said orders and on arrival at Suva reported to the British Naval Control Officer. On December 22, 1941 he was ordered by the British Naval Control Officer to proceed to Sydney, Australia, which order he obeyed. The *Portmar* arrived at Sydney on December 30, 1941 and her Master there reported to the Australian Naval Control Officer, who ordered the vessel to proceed to Brisbane and there discharge part of her cargo. In compliance with said order, the *Portmar* proceeded to and arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer at that port. Said officer then ordered the *Portmar* to proceed to

Port Darwin with the remainder of the cargo, which order was obeyed and the *Portmar* arrived at Port Darwin on January 19th. The Master reported to the Australian Naval Control Officer, who ordered the *Portmar* to discharge the remainder of the cargo so soon as a berth at the jetty was available. Pursuant to said order the *Portmar* remained at anchor for several days awaiting berth, and then moved into berth and discharged the remainder of her cargo, except 1500 drums of gasoline which her Master was ordered by the Australian Naval Control Officer to retain on board.

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NINTH: On or about January 26, 1942, on receipt of information as to the movements of the vessel as aforesaid, libelant caused respondents to be notified that the *Portmar* had been diverted to Australia on the outward voyage under Government orders, and requested that respondents hold the *Portmar* covered pending further advices. Respondents thereupon agreed to hold the *Portmar* covered in accordance with libelant's request.

TENTH: After the events alleged in Article EIGHTH hereof, the Master was ordered by the Australian Naval Control Officer at Port Darwin to reload 500 drums which had been discharged, and to proceed to Wyndham, Western Australia, and discharge all the drums on board, and to return to Port Darwin. Pursuant to said order the *Portmar* sailed from Port Darwin on February 4, 1942 and on February 8, 1942 arrived at Wyndham. The *Portmar* there discharged all cargo on board, and then, pursuant to orders as above stated, returned to Port Darwin, arriving there on February 12, 1942. At 1:00 A. M. on February 13, 1942, the Australian Naval Control Officer at Port Darwin ordered the *Portmar* to berth at daylight, and on the 13th and 14th of February the *Portmar*, pursuant to orders given by military authorities of the United States, and with the cooperation of the Australian Naval Control Officer, loaded on board the *Portmar* military equipment, stores and troops,

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including approximately 300 officers and men of the 148th United States Field Artillery Regiment. At about 9:30 P. M. on February 14th the Master was ordered by the Australian Naval Control Officer to report on board the U.S.S. *Houston,* and there received orders from the Commanding Officer of the U.S.S. *Houston* and from the Australian Naval Control Officer to proceed in convoy under the former's command. At 1:30 A. M. on February 15th, the *Portmar* left Port Darwin in convoy with other vessels under the command of the Commanding Officer of the U.S.S.
161 *Houston,* and proceeded towards Koepang, Timor.

ELEVENTH: On February 15th and 16th said convoy was attacked at sea by enemy bombers, and the *Portmar* suffered damage by the effect of bombs falling into the sea near the vessel. In consequence of said attack the convoy was ordered to and did return to Port Darwin, arriving there about noon, February 18th, 1942. At about 9:55 A. M. on February 19th an aerial attack was made by enemy aircraft on the harbor at Port Darwin, and in such attack the *Portmar* sustained further and extensive damage, both on deck and below. The hull was pierced in many places, above and below the water line by aerial fire
162 and bomb fragments and the ship began to take in water through the holes below the water line. Both standard and steering compasses were put out of action by aerial fire or bomb fragments. Fire broke out in No. 4 and 5 holds, but was brought under control. Being unable to keep the water down by pumping, and as the ship was taking a severe list, the Master decided to beach the vessel. While searching for an advantageous place, having no compass to assist in navigation, the *Portmar* ran aground at 2:12 P. M., on February 19th, 1942, on the starboard side from amidships to stern on the south side of a small cove south of Channel Island in about 11 or 12 feet of water. Efforts were made to plug holes in the hull made by bomb fragments and aerial fire, but the water in the vessel increased

until she took a list of about 40°, and the Master, in view of the danger of capsizing, gave orders for the crew to leave the ship. The members of the crew were removed and detained in restricted areas by the military authorities but the Master with three members stood by the vessel until February 21st, at which time the after decks were completely submerged at high tide. On that day the Master ordered the starboard anchor lowered in order to hold the ship in case of a high rise of the tide. On February 23rd the Master returned to the vessel and remained on board overnight and on February 24th. Again on March 2nd and 164
3rd the Master returned to the vessel and found that she had settled further by the stern, until the water completely covered the poop deck.

TWELFTH: Thereafter the Master, officers and crew were held by the military authorities and on March 10th were sent overland across Australia to Melbourne, and they arrived at Melbourne on March 22, 1942. Later the officers and crew, except the Master, were returned to the United States. At libelant's instructions the Master remained in Australia in the interest of the vessel until March 6, 1943, devoting his entire time and attention to all matters within 165
his control affecting the interests of the vessel and respondents.

THIRTEENTH: After the Master left the vessel and was detained by the military authorities as aforesaid, salvage operations for the raising and restoration of the *Portmar* were undertaken by Captain John Protheroe Williams, Managing Director of United Salvage Proprietary Limited, incorporated in the State of Victoria for the purpose of rendering salvage services. Captain Williams was also duly appointed chief salvage officer of the Commonwealth Salvage Board, an agency of the Australian Government created for the purpose of rendering aid in the salvage of vessels in Australian waters. These services, with expert

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divers and workmen, were diligently prosecuted until on or about the 5th day of April, 1942, when the vessel was floated, and with the aid and assistance of a vessel provided by the local naval authorities was removed to a berth or anchorage at Port Darwin.

FOURTEENTH: On April 8, 1942, the condition of the SS. *Portmar* was that even though lying afloat at Port Darwin she was seriously and extensively damaged as to hull, machinery and equipment by reason of said enemy
167 attacks and consequent grounding of said vessel. Among other particulars of damage, the following existed:

The entire hull had been subjected to terrific shock and vibration by the concussion of bombs falling near the vessel.

The hull and superstructure were pierced and shattered by bomb fragments and by aerial fire in said enemy attacks.

The seams, frames and boiler saddles showed indications of movement due to the shock of the bombs.

The port side of the ship, above and below the
168 water line, was riddled for the whole length of No. 4 and 5 holds with holes measuring from about one inch in diameter up to irregular and jagged openings of about five inches across.

The ship had lain aground at Port Darwin, as above described, from February 19th until April 5th, 1942, her holds, engine room and fireroom being filled with sand, fuel oil which escaped from her bunkers and double bottoms, and indiscriminate muck and debris.

More than half the ship, from the bridge to the stern, including engine and boiler rooms, had been submerged at high water while she lay aground at Port Darwin twice daily. The ship, while thus partially sunk had rested on her starboard side aft, but

with a heavy list to port. The forward end of the ship was always afloat and rising and falling with the range of the tide of nearly 20 feet. It was strongly indicated there had been a severe strain on the whole structure of the hull over a period of about seven weeks.

The interior condition of the engines was unknown and could not be ascertained. The exterior of the engines showed extensive corrosion in bearings, journals, etc. and bearings, pistons and valves seized. Link motion, eccentrics and valves were frozen. 170

The shaft alley was inaccessible, being filled with fuel oil, mud, dirt and water. It was impossible to ascertain the condition of the hull or of the propeller shaft in that area. It was impossible to disconnect the shaft couplings. It was later found that the propeller shaft had been thrown out of line, the shaft seized in the bearings, the journals and shaft pitted.

The condenser was fouled on both steam and water sides.

The electric wiring throughout the ship was badly damaged.

Asbestos covering on the feed lines and piping in the interior of the vessel was shattered and fallen away. 171

Bilge lines on the port boiler were shattered at each of two flange unions; bilge lines and shaft alley had become clogged with loosened scale.

The bilge line of No. 4 hold was fractured.

There was damage by fire in Nos. 4 and 5 holds.

In Nos. 4 and 5 holds and tween decks all woodwork, ceiling, cargo battens and hatches were found damaged beyond repair by fuel oil, and the sides, bulkheads, tank tops and bilges were covered and filled with fuel oil and mud.

The accommodations in both forward and amidships houses were completely demolished and shat-

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tered; the ceiling, paneling and wainscoting and doors were blasted and torn from their places and all furniture, lockers, cabinets and shelves scattered and damaged.

Crew's quarters aft in the poop with all fittings and furnishing therein were damaged beyond repair by fuel oil and long submersion in muddy water.

The ice machine was damaged by gun fire and all woodwork and insulation in the refrigerating room and chilling chamber had been damaged beyond repair.

173

The steel decks forward and aft showed perforations and dents from machine-gun fire and on the poop the rails, chocks, and leads were shattered and shot away.

The boat and bridge decks were holed and splintered and the engine room skylight and fiddley were riddled by machine-gun fire as well as the funnel, fire room and engine room ventilators.

The wooden boat deck and bridge deck were shrunk and leaking by not having had any water on them for a long interval in the tropical climate.

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Most of the cargo booms showed bullet holes and fragment damages. Much of her standing and running cargo gear was broken by gun fire.

Three of the booms had fallen to the deck because their topping lifts were shot away, causing further damage to the boom and decks.

One of the booms at No. 4 hold fell, carrying away the ladder to the boat deck and damaging the radio house.

The booms at No. 3 and 5 carried away permanent awnings and awning spars.

The radio house, which also contained the ship's hospital, was blasted off its foundation and part of its sides blown out.

The standard and steering compasses were wrecked by enemy fire and the port engine telegraph shot away. 175

The telemotor piping was badly damaged.

The poop mooring telegraph was shattered and the sounding machine was blasted off in the middle of the column.

The life boats on deck were riddled by machine-gun fire, and steam lines on deck were shattered and riddled by machine-gun fire. The davits were badly damaged, the falls either missing or destroyed. 176

Her steering engine was damaged.

An extensive amount of portable gear and equipment had been removed from the vessel by persons unknown and without any authority to do so from the Master or libelant.

FIFTEENTH: There were not any facilities for drydock or repair of the vessel at Port Darwin. The nearest port at which even temporary repairs could be made was the port of Brisbane on the East Coast of Australia, about 1800 miles away. There were no drydock facilities at Brisbane large enough to accommodate the vessel. It was plain that the *Portmar* would have to go to Sydney for drydocking and permanent repairs. The vessel was unable to move to Brisbane from Port Darwin under her own steam. There was no indication that any vessels were available for such a tow. Such a tow from Port Darwin to Brisbane had to pass through a considerable area which was regularly patroled by the Japanese Navy and aircraft. During the inevitable delay necessary to accomplish the arrangements for the towage, if towage could be arranged at all, the vessel would have had to remain at Port Darwin, where she was under constant danger of further enemy attack and possibly complete destruction. A full scale Japanese invasion was expected at any moment. It was strongly indicated that even though the vessel were brought to Brisbane 177

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or to Sydney, the repair facilities there located were so occupied with allied Government work that it might be difficult, if not impossible, to secure shipyard or drydock space for the ship. It was indicated that the salvors who had released the vessel from the strand and placed her afloat at Port Darwin would make a substantial claim for salvage award. Such a claim was thereafter intimated in the sum of £100,000 Australian. The cost of repairs necessary to restore the vessel to her condition before the enemy attacks and her classification in Lloyds Register of Shipping, as aforesaid, were later estimated at £120,000 Australian. The cost of towage from Port Darwin to Brisbane for temporary repairs in order to put the vessel's engine in condition so that she might move to Sydney for drydocking and permanent repairs, if such towage could be obtained, was indicated at fantastic sums. Even after the tow had later been accomplished, it was stated by a representative of the United States Government to have cost £32,403 Australian. It was also reasonably anticipated that survey fees and legal fees, costs and expenses would have to be incurred in connection with repairs, reequipment and restoration to class of the vessel and the adjudication of the pending claim for salvage award.

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SIXTEENTH: Under the circumstances aforesaid, and in view of the insured value of the vessel of $860,000 which, at exchange 3.25 was equivalent to £264,615 Australian, having in mind the expenses and charges already reasonably incurred and yet to be anticipated if there was to be any recovery, repair, reequipment and restoration of said vessel to her condition and class as before the enemy attacks aforesaid; the danger of total loss by further enemy attack while at Port Darwin or during about 1800 miles of towage through waters patroled in large part by Japanese sea and air forces; the high probability that even though towage to Brisbane or Sydney could be arranged, it might not be possible to obtain shipyard and dry-dock

space for the vessel; the high probability that the cost of the towage, salvage award, permanent and temporary repairs, reconditioning, reequipment, survey fees, legal fees, expenses of supervision and all expenses of like nature necessary to recover, repair and restore the vessel to her sound condition and class as before the enemy attacks aforesaid would exceed the total of her insured value stated in said policies, libelant, on the 8th day of April, 1942, through its London brokers, Thomas Stephens & Sons, Ltd., gave notice of abandonment under its policies or war risk insurance, to respondents, and claimed a 182
constructive total loss of said vessel. Respondents declined to accept the abandonment but agreed that libelant would be held to be in the same position as if writs had issued on April 8, 1942 in connection therewith.

SEVENTEENTH: On or about January 8, 1943 respondents informed libelant's broker, Thomas Stephens & Sons, Ltd., London, that they had given further very careful consideration to this case and had taken legal opinion on the facts, and requested said Thomas Stephens & Sons, Ltd. to state to libelant their conclusions as follows: That the facts disclosed that after arrival in Australia, the vessel 183
discharged her outward cargo and thereafter operated under the orders of the military authorities; that it was in the course of these operations on a series of local voyages to and from Port Darwin that she became a casualty; that these voyages were not even performed as a result of the owner's decision and quite clearly represented an entirely fresh series of adventures which could by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia; that whether it be held that respondents' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems

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immaterial for, whichever it be, they were definitely persuaded that all liability under their policies had terminated prior to the casualty; that they therefore requested Thomas Stephens & Sons, Ltd. to make it clear that they must, with regret, finally decline any liability in connection with this loss.

EIGHTEENTH: In consequence of respondents' refusal to accept abandonment tendered as aforesaid, libelant was forced to and did reasonably incur sundry heavy expenses
185 in the interest of said vessel and of respondents which it would not have incurred if said tender of abandonment had been accepted by respondents. These expenses were as follows:

Salvage award paid to United Proprietary Limited and John Protheroe Williams, pursuant to decree of the High Court of Australia in Admiralty, Docket No. 23, judgment rendered November 19, 1943, with costs	$20,608.63
Legal fees and expenses in connection with defense of said salvage suit in
186 Australia and also in obtaining necessary statements from the Master, officers and crew of the *Portmar* which libelant has either paid or has become liable to pay in a total sum now estimated at	7,500.00
Expenses of the Master of the *Portmar* in Australia pursuant to the Sue and Labor Clauses of said policies, in order to devote himself to the care and safety of said vessel and to all matters pertaining thereto, all in the interests of said vessel and of respondents as war risk underwriters of said vessel	13,152.49
Cables and miscellaneous expenses	1,500.00
	$42,761.12

NINETEENTH: The premium stipulated in each of said policies of war risk insurance was duly paid to the respective respondents on behalf of libelant, and was accepted by said respondents, and libelant has performed each and all of the obligations on its part to be performed under and pursuant to said policies of war risk insurance, or otherwise in the premises.

TWENTIETH: By reason of the premises, SS. *Portmar* was, on the 8th day of April, 1942, a constructive total loss and the abandonment made as of that date to respondents 188
was a valid abandonment; and thus on April 8, 1942 there became due and owing to libelant from respondents, according to their several undertakings under said policies of war risk insurance, as and for a constructive total loss of said vessel, a sum aggregating the amount of $860,000; and in addition thereto, there later became due and owing to libelant in like manner from respondents the further sum of $42,761.12 by reason of the matters alleged in Article EIGHTEENTH hereof, making a total sum of $902,761.12, and said total sum remains and is now due and owing to libelant from respondents as aforesaid with interest and costs. No part of said sum has been paid to libelant by respondents 189
although due demand has been made therefor.

For a Second Cause of Action.

TWENTY-FIRST: Libelant here realleges each and all of the matters alleged in Articles marked FIRST to FOURTEENTH, inclusive, of this libel, with the same force and effect as if here in full set forth.

TWENTY-SECOND: After the *Portmar* was floated on April 5, 1942, she was handed over by the salvors to the shipping authorities at Port Darwin. By reason of the extensive damage to said vessel caused by enemy action, as aforesaid, and because there were not any facilities for dry-dock

and repair of the vessel at Port Darwin, it was necessary to tow said vessel from the point where she lay in the harbor of Port Darwin after said enemy attacks, to the nearest port where repairs might be effected, Brisbane, on the East Coast of Australia. Libelant is informed that the contract or agreement for said towage was made by or on behalf of the Commonwealth Salvage Board, an agency of the Australian Government, and that the cost of said towage was guaranteed by the military authorities of the United States in Australia. Libelant is not informed as to the cost of said towage nor as to whether or not said towage has been paid for, but libelant is now informed that the actual cost of said towage was the sum of £16,700 Australian, equivalent to $54,275.00.

TWENTY-THIRD: The *Portmar* arrived at Brisbane on July 29, 1942. Surveys were held and temporary repairs were made at that port as soon as practicable. No dry-dock large enough for the *Portmar* nor facilities for the necessary permanent repairs were there available.

TWENTY-FOURTH: On or about August 24, 1942 libelant was informed that the Commonwealth Salvage Board had made claim of £100,000 Australian for salvage of SS. *Portmar* and that suit against the *Portmar* was threatened by said Salvage Board as well as by said United Salvage Proprietary Limited and said Captain John Protheroe Williams. Thereupon libelant proposed to respondents that libelant should take steps deemed advisable to defend action in Australia for excessive salvage demands against the *Portmar* without prejudice to any party respecting rights or liabilities under said policies. Respondents thereupon agreed to libelant's proposal, without prejudice, and pursuant to such agreement, libelant employed attorneys in Australia for defense of such claims and actions.

TWENTY-FIFTH: On November 17, 1942 at 12 o'clock noon Eastern Australian time, the United States of Amer-

ica, acting by and through the War Shipping Administrator, requisitioned title to, and took possession of, the *Portmar*. The vessel was then at Brisbane, still in damaged condition, as the repair of the damage had not theretofore been possible. After said requisition, and temporary repairs to the hull and engines of the vessel at Brisbane, secured by the United States military authorities, the *Portmar* proceeded to the port of Sydney under her own steam.

TWENTY-SIXTH: On or about November 20, 1942, while SS. *Portmar* was proceeding from the port of Brisbane to the port of Sydney for dry-docking, survey and permanent repairs, respondents appointed a surveyor at Sydney, Australia, and instructed him to participate in a joint survey of SS. *Portmar* to estimate the cost of repairs, without prejudice to the position of respondents.

TWENTY-SEVENTH: The *Portmar* arrived at the port of Sydney on November 23, 1942. Thereafter a joint survey of said vessel was held by surveyors representing libelant and respondents as well as War Shipping Administration. Said survey was held both afloat and in dry-dock in Sydney pursuant to arrangements made by the United States military authorities. On February 15, 1943 said surveyors reported to all the interested parties that the cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February 1942, as aforesaid, would amount to £28,000 Australian, equivalent to $91,000.

TWENTY-EIGHTH: Libelant here realleges each and all of the matters contained in Article SEVENTEENTH hereof, with the same force and effect as if here in full set forth.

TWENTY-NINTH: On or about February 13, 1943 United Salvage Proprietary Limited and John Protheroe Williams instituted suit *in rem* against the *Portmar* in the High

Court of Australia, in Admiralty, Docket No. 24, claiming a salvage award of £50,000 Australian by reason of salvage services rendered to the *Portmar* following the enemy attacks hereinbefore described. Thereafter said Commonwealth Salvage Board brought suit against Calmar Steamship Corporation *in personam* in the same Court, Docket No. 25, to enforce its claim for salvage award for services rendered to the *Portmar* after said enemy attacks. Pursuant to said agreement with respondents as to defense of such salvage claims, libelant defended said salvage
197 actions and caused the testimony of witnesses to be taken, including the testimony of the Master of the *Portmar* in defense of said claims. On November 19, 1943 said Court rendered judgment in said salvage proceedings allowing said United Salvage Proprietary Limited and said John Protheroe Williams a salvage award in the sum of £5,000 Australian with costs, but dismissing the claim of said Commonwealth Salvage Board with costs. Libelant has been obliged to, and has, satisfied the decree entered in favor of said United Salvage Proprietary Limited and said John Protheroe Williams with costs, in the sum of $20,608.63. In the course of said proceedings, libelant incurred legal fees, counsel fees and other expenses which
198 libelant has either paid, or is liable to pay, in a sum now estimated at $7,500.

THIRTIETH: In addition to the clauses of said policies hereinbefore quoted, said policies contained the following provisions:

> "* * * And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and

agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

Pursuant to said Sue and Labor Clauses of said policies, the Master of the *Portmar* was instructed by libelant to remain in Australia and to devote himself to the care and safety of said vessel and to all matters pertaining thereto, all in the interests of said vessel, and of respondents as war risk underwriters of said vessel. In addition thereto, after the *Portmar* had been placed on dry dock at Sydney and surveyed, as aforesaid, said salvage suits were instituted and it was necessary for the Master to remain in Australia to give testimony on behalf of the *Portmar* as a witness in said actions. These matters occupied the attention of the Master of the *Portmar* and required him to remain in Australia until March 6, 1943, when he returned to the United States. The expenses necessarily and reasonably incurred by libelant in maintaining the Master of the *Portmar* in Australia as aforesaid, and the cost of the Master's transportation from Melbourne, Australia, to New York, N. Y., amounted to the sum of $13,152.49.

THIRTY-FIRST: As a result of said enemy attacks on the *Portmar*, libelant was obliged to pay, and reasonably and necessarily incurred, sundry additional expenses in survey fees, the cost of cable messages and miscellaneous incidentals amounting to a sum now estimated at $1,500.

THIRTY-SECOND: Libelant is not informed as to the extent of temporary repairs effected as of the date and time of said requisition nor as to the extent of repairs or re-equipment of said vessel, if any, accomplished thereafter, nor as to the cost thereof.

THIRTY-THIRD: The premium stipulated in each of said policies of war risk insurance was duly paid to the respec-

tive respondents on behalf of libelant, and was accepted by said respondents, and libelant has performed each and all of the obligations on its part to be performed under said policies of insurance or otherwise in the premises.

THIRTY-FOURTH: In the event that it should appear that the notice of abandonment delivered by libelant to respondents as alleged in Article SIXTEENTH hereof, was not a valid notice of abandonment under all the circumstances and that therefore respondents were entitled to reject said abandonment, then by reason of the premises, libelant is entitled to
203 recovery of and from respondents, as and for a partial loss with respect to the SS. *Portmar* as insured under said policies of insurance, by reason of each and all of said several damages, costs and expenses suffered, borne and incurred by SS. *Portmar* and by libelant in the sum of $250,000 with interest, being the total of the known damages sustained by libelant as aforesaid in the sum of $188,036.12, and such estimated amounts, the true figures being as yet unknown to libelant, as were expended for temporary repairs at Brisbane, and further necessary for the complete reequipment of the *Portmar*, with interest on such several items. No part of said sum has been paid to libel-
204 ant by respondents, although due demand has been made therefor.

THIRTY-FIFTH: All and singular the premises are true and within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE libelant prays that citation in due form of law according to the rules and practice of this Honorable Court may issue against respondents and each of them, citing them and each of them to appear and answer in the premises; that libelant may have decree against said respondents and each of them according to their several undertakings under said policies of war risk insurance, in the total sum of $902,761.12 with interest, as and for a

constructive total loss of SS. *Portmar* and sundry expenses incurred with respect to SS. *Portmar* as alleged in the First Cause of Action hereof, together with the costs of this action; or, in the alternative, if libelant be not entitled to recover as and for a constructive total loss, that libelant may have decree against said respondents and each of them according to their several undertakings under said policies of war risk insurance, in the total sum of $250,000 with interest, as and for a partial loss of SS. *Portmar* as alleged in the Second Cause of Action hereof, together with the costs of this action; and that libelant may have such other and further relief as may be just.

KIRLIN CAMPBELL HICKOX KEATING & MCGRANN,
Proctors for Libelant,
Office and P. O. Address,
120 Broadway,
Borough of Manhattan,
City of New York 5, N. Y.

(Verified by H. W. Warley, President of Calmar Steamship Corporation, November 10, 1944.)

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Schedule A.

(Opposite ☞)

Lloyd's Policy is here reproduced in its entirety with the exception of a list of the individual underwriters in each Lloyd's Syndicate and the proportion of the Syndicate amount underwritten by each.

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Definitive Numbers of Syndicates and Amount, Percentage or Proportion of the Total Amount assured shared between the Members of those Syndicates.

Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.	Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.	Amount, Percentage or Proportion.	Syndicate No.	Underwriters' Reference.
U.S Dollars			$ 2250	897	24/11	10000	232	24/11
$ 20000	422	26/11/41	15000	213	"	4000	112	"
10000	420	"	15000	690	"	4000	110	"
30000	108	"	20000	785	26/11	10000	368	"
24000	418	"	4000	263	24/11	10000	30	"
2400	419	"	3000	407	"	10000	382	"
3000	621	"	3000	450	"	10000	817	"
27000	17	"	1500	901	"	8400	700	"
3000	19	"	3000	999	"	4200	701	"
20000								
~~8000~~ 10000	412	"	3000	756	"	1200	702	"
~~1250~~	464		2500	451	"	1200	704	"
10500	334		3750	707	"	10000	855	"
9000	424	"	3750	121	"	15000	31	"
6000	95	"	15000	945	"	10000	435	"
4500	98	"	3000	948	"	10000	465	"
12500	632	"	2000	949	"	7500	483	"
12500	633	"	15000	28	"	7500	725	"
2000	631	"	10500	410	"	1500	636	"
25000	62	"	3000	366	"	3000	714	"
25000	185	" WR 99	1500	414	"	3000	320	28/11
14000	64	24/11	13500	764	"	8000	622	27/11
3000	488	"	15000	89	"	7500	590	"
2500	486	"	7500	455	"	1500	591	"
2500	500	"	7500	456	"	4000	654	"
11250	895	"	~~1500~~ 5000	50	"	5000	336	"
1500	441	"	15000	125	"	5000	304	"

~~1250~~ 464 " | 2500 451 " | 1200 704 "
10500 334 | 3750 707 " | 10000 855 "
9000 424 " | 3750 121 " | 15000 31 "
6000 95 " | 15000 945 " | 10000 435 "
4500 98 " | 3000 948 " | 10000 465 "

continued overleaf.

WAR RISK

568

LLOYD'S INCORPORATED BY ACT OF PARLIAMENT LONDON

London, 19th January 1942

"PORTMAR" /S/✓

U.S.PACIFIC to PHILIPPINES ETC
AND RETUR.

✓
U.S.$.714,000:-✓

Definitive Policy to be issued.

Amount.	Percentage of Premium.	Syndicate No.	Underwriters' Reference
$ 4000 ✓	2%	396 ✓	2/1/11
2000 ✓	1/2%	241 ✓	285
500 ✓	1%	965 ✓	882
4000 ✓	1%	811 ✓	2
6000 ✓	1%		162
1000 ✓	1%		474
1000 ✓	1%		398
2500 ✓	1%		395

Int. Passed as per Proposition of the Total Amount of Syndicates.

WAR RISK

568

LLOYD'S INCORPORATED BY ACT OF PARLIAMENT LONDON

FOR SIGNATURE BY UNDERWRITING MEMBERS OF LLOYD'S ACTS 1871 TO 1937

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person interested in the same if so subscribed, will be proceeded against under the Acts.

S.G.

J.S.$.714, 1942

Printed at Lloyd's, London.

"Warranted that the Ship is the property of the Owner (s) of the Ship or of a British subject (s) and that during the currency of this insurance the Ship shall not be sold or transferred to or chartered to the Government of any country other than the British Commonwealth of Nations or any of them.

This warranty shall not apply to any sale or transfer to or charter to the Government of any country other than the British Commonwealth of Nations or any of them which may be made (a) for the purpose of the Ship's trading between ports or places in the British Commonwealth of Nations or any of them or (b) for the purpose of the Ship's trading between ports or places in the British Commonwealth of Nations or any of them and ports or places in the United States of America or (c) for the purpose of the Ship's trading between ports or places in the United States of America or in the British Commonwealth of Nations or any of them and ports or places in any country other than the British Commonwealth of Nations or any of them."

U.S.PACIFIC to PHILIPPINES ETC
AND RETUR.

✓
U.S.$.714,000:-✓

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises, and Ship, or any Part thereof; And in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour and travel for, in and about the Defence, Safeguard and Recovery of the said Goods and Merchandises, and Ship, or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we the Assurers will contribute each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no Acts of the Assurer or Assured in recovering, saving or preserving the Property insured shall be considered as a waiver or an acceptance of Abandonment. And it is agreed by us the Assurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London. And so we the Assurers are contented, and do hereby promise and bind ourselves each one for his own Part, our Heirs, Executors and Goods, to the Assured, their Executors, Administrators and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured, after the Rate of

Warranted free from consequences of hostilities or warlike operations, whether before or after declaration of war, civil strife, arrests, restraints and detainments of all kinds.

And so in case of any Claim, we the Assurers bind ourselves each one for his own Part, our Heirs, Executors and Goods, to the Assured, their Executors, Administrators and Assigns. And for the Premium and Consideration aforesaid we agree to admit the Assurance to be made and Interest to be had, according to the Form of the Policy, at and after the Rate above mentioned.

IN WITNESS whereof we the Assurers have subscribed our Names and Sums assured in London.

as hereinafter mentioned. DECLARATION.

N.B.—Steel, Iron, Hemp, Flax, Timber and Deals are warranted free from Average unless general or the Ship be stranded.

NOTICE. Each Policy attached to this Slip is subscribed by the Assurers thereon alone and not one another, and/or Declaration, and the Assurers are only liable for the due proportion of their respective Subscriptions of the total Sum insured by such Assurers.

IN WITNESS whereof I the undersigned have subscribed my name and seal on behalf of the Assurers.

DGF/JP ✓

(In the

(12-11-39) 24-12-40

D41/11356 ✓

661/3 LR

10142 * 12 FEB 1942

568

No Policy or other Contract dated on or after 1st Jan., 1924, will be recognised by the Committee of Lloyd's as entitling the holder to the benefit of the Funds and/or Guarantees lodged by the Underwriters of the Policy or Contract as security for their liabilities unless it bears at foot the Seal of Lloyd's Policy Signing Office.

Be it known that CALMAR STEAMSHIP CORPORAT

as well in *their* own Name, as for and in the Name and Names of all and every [illegible] Person [illegible] nce, an[illegible] Persons to whom the same doth, may, or shall appertain, in part or in all, doth mak[illegible] cause *themselves* and them and every of them, to be insured, lost or not lost, at a[illegible]

A UNITED STATES PACIFIC port to port or port[illegible] PHILIPPINES ISLANDS, whilst there and return [illegible] STATES PACIFIC port or UNITED STATES ATLANTIC port[illegible]

upon any kind of Goods and Merchandises, and also the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the +(Via Panama Ca[illegible] Via "PORTMAR" /S/ (Warranted sailing port or ports [illegible] as per slip) and for 24 h[illegible]s a[illegible] arrival.

whereof is Master, under God, for this present Voyage, [illegible] Ship o[illegible] er or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names [illegible] fro[illegible] ng thereof, is or shall be named or called, beginning the Adventure upon the said Goods and Mer[illegible] upon th[illegible] *above* thereof aboard the said Ship *as above*

and shall so continue and endure during her Ab[illegible] e said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goo[illegible] handises upon the said Ship, &c., whatsoever, shall be arrived at *as above*

until she hath moored at anchor ~~Twenty-four Hours~~ in good Safety, and upon the Goods and Merchandises [illegible] the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage [illegible] all to and touch and stay at any Ports or Places whatsoever *and wheresoever for all purposes* without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for a[illegible] Assured by Agreement between the Assured and Assurers in this Policy, are and shall be val[illegible]

On HULL & MACHINERY Valued at [illegible]000 Amount insured hereunder - Seve[illegible] and Fourteen Thousand United Sta[illegible]rs

Only against the risks of war, s[illegible] riots and civil commotions as [illegible] Form attached.

"Warranted that throughout the full period named in this policy the Owner (s) of the vessel (s) hereby insured is (are) in possession of a British Government 'Ship warrant,' or that a certificate permitting insurance has been issued by the British Ministry of Shipping in respect of such vessel s, or that the vessel s) be chartered to the British Ministry of Shipping or to a national of the British Commonwealth of Nations (excluding E[illegible]

This warranty does not apply to the insured vessel(s) if (a) under 200 gross tons

or (b) of British (excluding Eire) Allied (the [illegible] Belgian, Dutch Greek Norwegian or Polish United States of America or Swedish Registration.

or (c) trading exclusively on the rivers or inland waters or customarily employed within the limits of a port of North Central or South America, or on the Yangtsze River."

TOUCHING the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and People, of what Nation, Condition or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any Part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for in and about the Defence, Safeguard, and Recovery of the said Goods and Merchandises and Ship, &c., or any Part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his Sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

Warranted free of capture seizure arrest restraint or detainment, and the consequences thereof or of any attempt thereat; also from the consequences of hostilities or warlike operations, whether there be a declaration of war or not, civil war, revolution rebellion insurrection or civil strife arising therefrom, or piracy.

And so we, the Assurers, are contented, and do hereby promise and bind ourselves, each one for his own Part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured at and after the Rate of $1.50 percent. ✓

19th January, 1942.

IN WITNESS whereof we, the Assurers, have subscribed our Names and Sums assured in *LONDON*, No. D41/11356 ✓ as hereinafter appears.

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

NOW KNOW YE, that We the Assurers members of the Syndicates whose definitive Numbers in the attached list are set out in the Table overleaf, hereby bind Ourselves, each for his own part and not for one another, and in respect of his due proportion only, to pay or make good to the Assured all such Loss and/or Damage which he or they may sustain by any one or more of the aforesaid perils, and so that the due proportion for which each of Us the Assurers is liable shall be ascertained by reference to his proportion as ascertained according to the said List of the Amount, Percentage, or Proportion of the total Sum assured which is in the said Table set opposite the definitive Number of the Syndicate of which such Assurer is a member.

IN WITNESS whereof the Manager of Lloyd's Policy Signing Office has subscribed his Name on behalf of each of Us.

LLOYD'S POLICY SIGNING OFFICE.

MANAGER.

DGF/JP.

(In the event of accident whereby loss or damage may result in a claim under this Policy, the settlement will be much facilitated if immediate notice be given to the nearest Lloyd's Agent.)

(18-11-39) 24-12-40 M25

Any person not an Underwriting Member of Lloyd's subscribing this Policy, or any person uttering the same if so subscribed, will be liable to be proceeded against under Lloyd's Acts.

S.G.

J.S.$ 714,000:-

Printed at Lloyd's, London, England.

This insurance also covers damage to or destruction of the property insured directly caused by strikers, locked out workmen, or persons taking part in labor disturbances or riots or civil commotions and destruction of or damage to the property directly caused by persons acting maliciously.

MD2

WAR RISK CLAUSES

It is agreed that this insurance covers only those risks which would be vered by the attached policy (including the Collision Clause) in the absence of the C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:-

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes, or peoples.

The premium paid for this insurance shall not be subject to any return for layups or otherwise.

The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor:-

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required".

F-300

Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.

B.C.2

Note

Page 71 is blank.

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Answer, Dated July 16, 1947.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES DISTRICT COURT,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Adm. 133-332.

The answer of Sydney Keith Scott, The Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd.,
215 Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company Limited, to the libel and complaint of Calmar Steamship Corporation, in an alleged cause of Contract and War Risk Insurance, civil and maritime, alleges upon information and belief, as follows:

FIRST: Respondents admit the allegations in Article First of the libel.

216 SECOND: Respondents admit the allegations in Article Second of the libel, except that they deny knowledge or information sufficient to form a belief as to the operation of the SS. *"Portmar"* by the libelant subsequent to January 19, 1942.

THIRD: Respondents admit and allege that libelant represented to respondents that the *"Portmar"* was to be employed as a merchant vessel for trading for one round voyage from a United States Pacific port to port or ports in the Philippine Islands and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order; and, on information and belief, admit that the SS. *"Portmar"* was chartered as alleged in Article Third of the libel.

Answer, Dated July 16, 1947. 217

FOURTH: Respondents admit the allegations in Article Fourth of the libel.

FIFTH: Respondents admit the allegations in Article Fifth of the libel.

SIXTH: Respondents admit the allegations in Article Sixth of the libel.

SEVENTH: Respondents admit that each of the said policies contains, among other clauses, the clauses quoted in Article Seventh of the libel. 218

EIGHTH: Respondents admit and allege on information and belief that on November 28, 1941, the *"Portmar"* sailed from San Francisco with a cargo bound for Manila, Philippine Islands, and followed that voyage until December 11, 1941, when she was ordered by the Commandant of the Twelfth United States Naval District to put into Suva, Fiji Islands. The Master of the *"Portmar"* obeyed said orders and proceeded to Suva, whence she proceeded to Sydney, Australia, and arrived at Sydney on December 30, 1941, and was ordered to proceed to Brisbane and there discharge part of her cargo; that in compliance with said 219 order the *"Portmar"* proceeded to and arrived at Brisbane on January 5, 1942, and there discharged a portion of her cargo designated by the Australian Naval Control Officer at that port; that said officer then ordered the *"Portmar"* to proceed to Port Darwin with the remainder of the cargo, which order was obeyed and the *"Portmar"* arrived at Port Darwin on January 19th; that the master reported to the Australian Naval Control Officer, who ordered the *"Portmar"* to discharge the remainder of the cargo; and pursuant to said order the *"Portmar"* discharged the remainder of her cargo, except 1,500 drums of gasoline which her master was ordered by the Australian Naval

CALMAR STEAMSHIP CORPORATION

FOR ACCOUNT OF THEMSELVES

but subject to the provisions of this Policy with respect to change of ownership.

Should the Vessel be sold or transferred to other ownership or chartered on a bareboat basis or requisitioned on that basis, then, unless the Underwriters agree thereto in writing, this Policy shall thereupon become cancelled from date of such sale, transfer, charter or requisition; provided, however, that in the case of an involuntary transfer by requisition or otherwise, without the prior execution of any written agreement by the Assured, such cancellation shall take place fifteen days after such transfer; and provided further that if the Vessel has cargo on board and has already sailed from her loading port, or is at sea in ballast, such cancellation shall be suspended until arrival at final port of discharge if with cargo or at port of destination if in ballast. This insurance shall not inure to the benefit of any such charterer or transferee of the Vessel, and if a loss payable hereunder should occur during such period of fifteen days the Underwriters shall be subrogated to all the rights of the Assured against the transferee, by reason of such transfer, in respect to all or part of such loss as is recoverable from the transferee and in the proportion which the respective amounts insured bear to the insured value. A pro rata daily return of net premium shall be made. The foregoing provisions with respect to cancellation in the event of sale, transfer, charter or requisition shall apply even in the case of insurance "for account of whom it may concern".

Loss, if any, payable to them, or order.

In the sum of Seven Hundred and Fourteen Thousand United States Dollars ✓ Dollars.

At and from the as below day of

To the as below day of } beginning and ending with time.

Provided, however, should the Vessel at the expiration of this Policy be at sea, or in distress, or at a port of refuge or of call, she shall, provided previous notice be given to the Underwriters, be held covered at a pro rata monthly premium to her port of destination.

On the Steamer called the "PORTMAR" (United States Flag)

(or by whatsoever name or names the said Vessel is or shall be called).

The said Vessel, for so much as concerns the Assured, by agreement between the Assured and Underwriters in this Policy, is and shall be valued at as follows:

Hull, tackle, apparel, passenger fittings, equipment, stores, ordnance, munitions, boats and other furniture . . . . . $ } $ 860,000.

Boilers, machinery, refrigerating machinery and insulation, and everything connected therewith $

Donkey boilers, winches, cranes, windlasses, steering gear and electric light apparatus shall be deemed to be a part of the hull and not of the machinery.

The Underwriters to be paid in consideration of this insurance Dollars

being at the rate of 1-1/2 per cent.

In event of non-payment of premium thirty days after attachment this Policy may be cancelled by the Underwriters upon five days written notice being given the Assured.

To return ___ cents per cent. net for each uncommenced month if it be mutually agreed to cancel this Policy.
As follows for each consecutive 30 days the Vessel may be laid up in port, viz.:—
___ cents per cent. net under repair or outside the United States;
___ cents per cent. net in the United States with cargo on board and not under repair;
___ cents per cent. net in the United States not under repair, and with no cargo on board excepting while actually loading or discharging.
Provided always: (a) that in no case shall a return be allowed when the within named Vessel is lying in a roadstead or in exposed and unprotected waters.
(b) that in the event of a return for special trade, or any other reason, being recoverable, the above rates of return of premium shall be reduced accordingly.
} and arrival.

In the event of the Vessel being laid up in port for a period of 30 consecutive days, a part only of which attaches to this Policy, it is hereby agreed that the laying up period, in which either the commencing or ending date of this Policy falls, shall be deemed to run from the first day on which the Vessel is laid up and that on this basis Underwriters shall pay such proportion of the return due in respect of a full period of 30 days as the number of days attaching thereto bear to thirty.

BEGINNING THE ADVENTURE upon the said Vessel, as above, and so shall continue and endure during the period aforesaid, as employment may offer, in port and at sea, in docks and graving-docks, and on ways, gridirons and pontoons, at all times, in all places, and on all occasions, services and trades whatsoever and wheresoever, under steam, motor power or sail; with leave to sail or navigate with or without pilots, to go on trial trips and to assist and tow vessels or craft in distress, but if without the approval of Underwriters the Vessel be towed, except as is customary or when in need of assistance, or undertakes towage or salvage services under a pre-arranged contract made by Owners and/or Charterers, the Assured shall pay an additional premium if required by the Underwriters but no such premium shall be required for customary towage by the Vessel in connection with loading and discharging. With liberty to discharge, exchange and take on board goods, specie, passengers and stores, wherever the Vessel may call at or proceed to, and with liberty to carry goods, live cattle, &c., on deck or otherwise. Including all risks of docking, undocking, changing docks, or moving in harbor and going on or off gridiron or graving dock as often as may be done during the currency of this Policy.

But Warranted as follows: This policy covers only War Risks, Strikes, Riots, etc. as per attached clauses.

At and from a United States Pacific port to port or ports in the Phillipine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any ~~route~~ order and for 24 hours after arrival.

In the event of accident whereby loss or damage may result in a claim under this Policy, notice shall be given in writing to the Underwriters, where practicable, prior to survey, so that they may appoint their own surveyor if they so desire. The Underwriters shall be entitled to decide the port to which a damaged Vessel shall proceed for docking or repairing (the actual additional expense of the voyage arising from compliance with Underwriters' requirements being refunded to the Assured) and Underwriters shall also have a right of veto in connection with the place of repair or repairing firm proposed and whenever the extent of the damage is ascertainable the majority (in amount) of the Underwriters may take or may require to be taken tenders for the repair of such damage. In cases where a tender is accepted with the approval of Underwriters, an allowance shall be made at the rate of 30 per cent. per annum on the insured value for each day or part thereof from the time of the completion of the survey until the acceptance of the tender provided that it be accepted without delay after receipt of Underwriters' approval. No allowance shall be made for any time during which the Vessel is loading or discharging cargo or bunkering or taking in fuel. Due credit shall be given against the allowance as above for any amount recovered:—

(a) in respect of fuel and stores and wages and maintenance of the Master, Officers and Crew or any member thereof allowed in General or Particular Average;

(b) from third parties in respect of damages for detention and/or loss of profit and/or running expenses;

for the period covered by the tender allowance or any part thereof.

In the event of failure to comply with the conditions of this clause 15 per cent. shall be deducted from the amount of the ascertained claim.

Warranted that the amount insured for account of the Assured and/or their managers on Disbursements, Commissions and/or similar interests, "policy proof of interest" or "full interest admitted" or on excess or increased value of Hull or Machinery, however described, shall not, except as indicated below, exceed 10 per cent. of the insured valuation of the Vessel, but the Assured may in addition thereto effect "policy proof of interest" or "full interest admitted" insurance on any of the following interests:

(a) Premiums. Any amount not in excess of actual premiums for twelve months on all interests of whatsoever nature insured (including estimated premium on any Protection and Indemnity Insurance), but in all cases reducing monthly by a proportionate amount of the whole, and

(b) Freight and/or Chartered Freight and/or Anticipated Freight and/or Earnings and/or Hire or Profits on Time Charter and/or Charter for series of voyages for any amount not exceeding in the aggregate 15 per cent. of the insured valuation of the Vessel; and if the actual amount at risk on any or all of such interests shall exceed such 15 per cent. of the insured valuation of the Vessel, the Assured and/or their managers may, without prejudice to this warranty, insure whilst at risk the excess of such interests reducing as earned, and

(c) Risks excluded by the "F. C. & S. Clause", and

(d) Loss or damage in consequence of strikes, lockouts, political or labor disturbances, civil commotions, riots, martial law, military or usurped power or malicious act.

Provided always that a breach of this warranty shall not afford the Underwriters any defense to a claim by mortgagees or other third parties who may have accepted this Policy without notice of such breach of warranty nor shall it restrict the right of the Assured and/or their managers to insure in addition General Average and/or Salvage Disbursements whilst at risk.

(CONTINUED)

F. C. & S. CLAUSE

Unless physically deleted by the Underwriters, the following warranty shall be paramount and shall supersede and nullify any contrary provision of the Policy:

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force.

Held covered in case of any breach of warranty as to cargo, trade, locality or date of sailing, provided notice be given and any additional premium required be agreed immediately after receipt of advices of breach or proposed breach by Owners.

Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Counter-Mart, Surprisals, Takings at Sea, Arrests, Restraints and Detainments of all Kings, Princes and Peoples, of what nation, condition or quality soever, Barratry of the Master and Mariners and of all other like Perils, Losses and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any Loss or Misfortune, it shall be lawful for the Assured, their Factors, Servants and Assigns, to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of the said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment.

This insurance also specially to cover (subject to the Average Warranty) loss of or damage to hull or machinery directly caused by the following:—

Accidents in loading, discharging or handling cargo, or in bunkering or in taking in fuel;

Explosions on shipboard or elsewhere;

Bursting of boilers, breakage of shafts or any latent defect in the machinery or hull (excluding, however, the cost and expense of repairing or renewing the defective part);

Contact with Aircraft;

Negligence of Master, Charterers, Mariners, Engineers or Pilots;

Provided such loss or damage has not resulted from want of due diligence by the Owners of the Vessel, or any of them, or by the Managers.

Masters, Mates, Engineers, Pilots or Crew not to be considered as part owners within the meaning of this clause should they hold shares in the Vessel.

And it is further agreed that in the event of salvage, towage or other assistance being rendered to the Vessel hereby insured by any Vessel belonging in part or in whole to the same Owners or Charterers, the value of such services (without regard to the common ownership or control of the Vessels) shall be ascertained by arbitration in the manner below provided for under the Collision Clause, and the amount so awarded so far as applicable to the interest hereby insured shall constitute a charge under this Policy.

General Average, Salvage and Special Charges payable as provided in the contract of affreightment, or failing such provision, or there be no contract of affreightment, payable in accordance with the Laws and Usages of the Port of New York. Provided always that when an adjustment according to the laws and usages of the port of destination is properly demanded by the owners of the cargo, General Average shall be paid in accordance with same.

When the contributory value of the Vessel is greater than the valuation herein the liability of these Underwriters for General Average contribution (except in respect to amount made good to the Vessel) or Salvage shall not exceed that proportion of the total contribution due from the Vessel that the amount insured hereunder bears to the contributory value; and if because of damage for which these Underwriters are liable as Particular Average the value of the Vessel has been reduced for the purpose of contribution, the amount of the Particular Average claim under this Policy shall be deducted from the amount insured hereunder and these Underwriters shall be liable only for the proportion which such net amount bears to the contributory value.

In the event of expenditure for Salvage, Salvage Charges or under the Sue and Labor Clause, this Policy shall only be liable for its share of such proportion of the amount chargeable to the property hereby insured as the insured value, less loss and/or damage, if any, for which the Underwriters are liable, bears to the value of the salved property. Provided that where there are no proceeds or there are expenses in excess of the proceeds, the expenses, or the excess of the expenses, as the case may be, shall be apportioned upon the basis of the sound value of the property at the time of the accident and this Policy without any deduction for loss and/or damage shall bear its pro rata share of such expenses or excess of expenses accordingly.

Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 per cent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other Ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found.

Grounding in the Panama Canal, Suez Canal or in the Manchester Ship Canal or its connections, or in the River Mersey above Rock Ferry Slip, or in the River Plate (above a line drawn from the North Basin, Buenos Aires, to the mouth of the San Pedro River) or its tributaries, or in the Danube or Demerara Rivers or on the Yenikale Bar, shall not be deemed to be a stranding.

Average payable on each valuation separately or on the whole, without deduction of thirds, new for old, whether the Average be Particular or General.

No claim shall in any case be allowed in respect of scraping or painting the Vessel's bottom.

The warranty and conditions as to Average under 3 per cent. to be applicable to each voyage as if separately insured, and a voyage shall be deemed to commence at one of the following periods to be selected by the Assured when making up the claim, viz.: at any time at which the Vessel (1) begins to load cargo or (2) sails in ballast to a loading port. Such voyage shall be deemed to continue during the ensuing period until either she has made one outward and one homeward passage (including an intermediate ballast passage, if made) or has carried and discharged two cargoes, whichever may first happen, and further, in either case, until she begins to load a subsequent cargo or sails in ballast for a loading port. When the Vessel sails in ballast to effect damage repair such sailing shall not be deemed to be a sailing for a loading port although she loads at the repairing port. In calculating the 3 per cent. above referred to, Particular Average occurring outside the period covered by this Policy may be added to Particular Average occurring within such period provided it occur upon the same voyage (as above defined), but only that portion of the claim arising within such period shall be recoverable hereon. The commencement of a voyage shall not be so fixed as to overlap another voyage on which a claim is made on this or the preceding Policy.

No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

In the event of Total or Constructive Total Loss, no claim to be made by the Underwriters for freight, whether notice of abandonment has been given or not.

In no case shall Underwriters be liable for unrepaired damage in addition to a subsequent Total Loss sustained during the term covered by this Policy.

And it is further agreed that if the Vessel hereby insured shall come into collision with any other Ship or Vessel and the Assured or the Charterers in consequence thereof or the Surety for either or both of them in consequence of their undertaking shall become liable to pay and shall pay by way of damages to any other person or persons any sum or sums in respect of such collision, we, the Underwriters, will pay the Assured or Charterers such proportion of such sum or sums so paid as our respective subscriptions hereto bear to the value of the Vessel hereby insured, provided always that our liability in respect of any one such collision shall not exceed our proportionate part of the value of the Vessel hereby insured. And in cases where the liability of the Vessel has been contested, or proceedings have been taken to limit liability, with the consent in writing of a majority (in amount) of the Underwriters on the hull and/or machinery, we will also pay a like proportion of the costs which the Assured or Charterers shall thereby incur, or be compelled to pay; but when both Vessels are to blame, then, unless the liability of the Owners or Charterers of one or both of such Vessels becomes limited by law, claims under the Collision Clause shall be settled on the principle of Cross-Liabilities as if the Owners or Charterers of each Vessel had been compelled to pay to the Owners or Charterers of the other of such Vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the Assured or Charterers in consequence of such collision; and it is further agreed that the principles involved in this clause shall apply to the case where both Vessels are the property, in part or in whole, of the same Owners or Charterers, all questions of responsibility and amount of liability as between the two Vessels being left to the decision of a single Arbitrator, if the parties can agree upon a single Arbitrator, or failing such agreement, to the decision of Arbitrators, one to be appointed by the Managing Owners or Charterers of both Vessels, and one to be appointed by the majority (in amount) of Hull Underwriters interested; the two Arbitrators chosen to choose a third Arbitrator before entering upon the reference, and the decision of such single, or of any two of such three Arbitrators, appointed as above, to be final and binding. Provided always that this clause shall in no case extend to any sum which the Assured or Charterers may become liable to pay or shall pay for removal of obstructions under statutory powers, for injury to harbors, wharves, piers, stages and similar structures, consequent on such collision, or in respect of the cargo or engagements of the Insured Vessel, or for loss of life, or personal injury. And provided also that in the event of any claim being made by Charterers under this clause they shall not be entitled to recover in respect of any liability to which the Owners of the Vessel, if interested in this Policy at the time of the collision in question, would not be subject, nor to a greater extent than the Shipowners would be entitled in such event to recover.

SERVICE OF SUIT CLAUSE (U. S. A.).—It is agreed that in the event of the failure of Underwriters hereon to pay any amount claimed to be due hereunder, Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of any Court of competent jurisdiction within the United States and will comply with all requirements necessary to give such Court jurisdiction, and service of process in such suit may be made upon Messrs. Duncan & Mount, New York, N. Y., and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal. Messrs. Duncan & Mount, New York, N. Y., are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the Assured's request to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

The terms and conditions of this form are to be regarded as substituted for those of Policy form to which it is attached, the latter being hereby waived, except provisions required by law to be inserted in the Policy.

Attached to Policy No. D11/11356. of the Lloyds. London.

American Institute TIME (HULLS) (July 1, 1941) F

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Control Officer to retain on board. Respondents deny that they or any of them have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Eighth of the libel.

NINTH: Respondents admit that on or about January 26, 1942, libelant through its London brokers, Thos. Stephens & Sons, Ltd., notified respondents that the S/S *Portmar* had been diverted to Australia on her outward voyage under Government orders, and requested that the vessel be held covered pending further advices; and that
221 the respondents agreed that the vessel be held covered to Australia. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in Article Ninth of the libel.

TENTH: On information and belief, respondents admit the allegations in Article Tenth of the libel.

ELEVENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Eleventh of the libel.

TWELFTH: Respondents deny that the master devoted any part of his time and attention to any matters affecting
222 respondents' interests, deny that the master devoted all or any appreciable part of his time and attention to matters affecting the interests of the vessel subsequent to February 21, 1942, and deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twelfth of the libel.

THIRTEENTH: Respondents admit that the S/S *Portmar* was floated on or about April 5, 1942, under the direction of Captain John Protheroe Williams, Managing Director of United Salvage Proprietary Limited, who was also appointed Chief Salvage Officer of the Commonwealth Salvage Board of the Australian Government; and deny any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Thirteenth of the libel.

223

FOURTEENTH: Respondents admit that the *Portmar* was lying safely afloat in the Harbor of Port Darwin on April 8, 1942, although somewhat damaged by enemy bombing attacks, and deny any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Fourteenth of the libel.

FIFTEENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Fifteenth of the libel.

SIXTEENTH: Respondents admit that on the 8th day of April, 1942, libelant, through its London Brokers, Thos. Stephens & Sons, Ltd., gave an attempted notice of abandonment to respondents, and that respondents declined to accept said attempted notice of abandonment, but agreed that libelant would be held to be in the same position as if writs had issued on April 8, 1942, in connection therewith; and respondents deny each and every other allegation in Article Sixteenth of the libel.

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SEVENTEENTH: Respondents admit that on the facts disclosed to them by libelant, they denied liability on several grounds including those set forth in Article Seventeenth of the libel.

225

EIGHTEENTH: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Eighteenth of the libel.

NINETEENTH: Respondents admit that the libelant paid and the respondents severally accepted the amount of premium stipulated in each of the said policies for the voyage stipulated therein, and deny each and every other allegation in Article Nineteenth of the libel.

TWENTIETH: Respondents admit demand and non-payment, and deny each and every other allegation in Article Twentieth of the libel.

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Answering the Libelant's Second Cause of Action:

TWENTY-FIRST: Respondents here repeat all the admissions and denials above set forth as to the matters alleged in Articles First to Fourteenth, inclusive, of the libel.

TWENTY-SECOND: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Twenty-second of the libel.

227 TWENTY-THIRD: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Twenty-third of the libel.

TWENTY-FOURTH: Respondents admit that they agreed without prejudice to the rights or liabilities of any party under the policies herein sued on, that libelant defend an action in Australia for excessive salvage demands against the *"Portmar"*, and deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-fourth of the libel.

228 TWENTY-FIFTH: On information and belief, respondents admit that the *"Portmar"* proceeded from Brisbane to Sydney under her own steam. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-fifth of the libel.

TWENTY-SIXTH: Respondents admit that on or about November 19, 1942, they appointed a surveyor to join in a joint survey of the *"Portmar"* at Sydney to estimate the cost of repairs, without prejudice to respondents' position; and respondents deny each and every other allegation in Article Twenty-sixth of the libel.

TWENTY-SEVENTH: Respondents admit that on a joint survey of the S/S *"Portmar"* held at Sydney, N. S. W.,

Australia, afloat and in drydock, it was agreed that the cost of all damage repairs necessary to restore the *"Portmar"* to the condition she was in prior to being bombed in the Timor Sea and at Port Darwin in February, 1942, would amount to £28,000 Australian; and deny that they have any knowledge or information sufficient to form a belief as to the truth of each and every other allegation in Article Twenty-seventh of the libel. 229

TWENTY-EIGHTH: Respondents admit that on the facts disclosed to them by libelant, they denied liability on several grounds, including those set forth in Article Seventeenth and realleged in Article Twenty-eighth of the libel. 230

TWENTY-NINTH: Respondents admit that on or about February 13, 1943, United Salvage Proprietary Limited and John Protheroe Williams instituted suit *in rem* against the *"Portmar"* in the High Court of Australia in Admiralty, Docket No. 24, claiming a salvage award of £50,000 Australian, by reason of salvage services rendered to the *"Portmar"* following enemy attacks; that thereafter said Commonwealth Salvage Board brought suit against Calmar Steamship Corporation *in personam* in the same Court, Docket No. 25, to enforce its claim for salvage award for services rendered the *"Portmar"* after said enemy attacks. 231 That libelant defended said salvage actions and caused the testimony of witnesses to be taken; and that on November 19, 1943, said Court rendered judgment in said salvage proceedings allowing said United Salvage Proprietary Limited and said John Protheroe Williams a salvage award in the sum of £5,000 Australian with costs, but dismissing the claim of said Commonwealth Salvage Board with costs. Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the other allegations in Article Twenty-ninth of the libel.

THIRTIETH: Respondents admit that the aforesaid policies each contained the words quoted in Article Thir-

232 *Answer, Dated July 16, 1947.*

tieth of the libel; and deny each and every other allegation in Article Thirtieth of the libel.

THIRTY-FIRST: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Thirty-first of the libel.

THIRTY-SECOND: Respondents deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations in Article Thirty-second of the libel.

233 THIRTY-THIRD: Respondents admit that the libelant paid and the respondents severally accepted the amount of premium stipulated in each of the said policies for the voyage stipulated therein, and deny each and every other allegation in Article Thirty-third of the libel.

THIRTY-FOURTH: Respondents admit demand and non-payment, and deny each and every other allegation of Article Thirty-fourth of the libel. The respondents specifically deny that the S/S *"Portmar"*, at the time she suffered the damages referred to in the libel, was covered by the policies sued on herein.

234 THIRTY-FIFTH: Respondents admit the Admiralty and Maritime jurisdiction of the United States and of this honorable Court, and deny each and every other allegation in Article Thirty-fifth of the libel.

Further Answering Said Libel and for a First, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief:

THIRTY-SIXTH: Respondents subscribed and issued the several insurance policies hereinabove referred to, wherein and whereby they, severally for specified amounts and not jointly, insured the libelant against risks therein specified

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for a voyage of the S/S "*Portmar*" at and from a United States Pacific Port to port or ports in the Philippine Islands, whilst there, and return to United States Pacific Port or United States Atlantic Port (via Panama Canal), via port or ports, any order and for twenty-four hours after arrival.

THIRTY-SEVENTH: On or about November 28, 1941, the "*Portmar*" sailed on the said voyage from San Francisco bound for Manila, Philippine Islands and followed the said voyage until on or about December 11, 1941, when she changed the said voyage and proceeded to Suva, Fiji 236
Islands, whence she sailed on or about December 22, 1941, and arrived at Sydney, Australia, on or about December 30, 1941; whence she sailed to Brisbane, Australia, arriving there about January 5, 1942, whence she sailed for Port Darwin, Australia, and arrived there in good safety on or about January 19, 1942, and there remained in good safety for more than twenty-four hours and discharged almost all of her cargo and had full opportunity to discharge all of her cargo; and thereupon the said voyage was broken up, terminated and abandoned, and the said policies and each of them by their terms and intent expired and terminated.

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Further Answering Said Libel and for a Second, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief:

THIRTY-EIGHTH: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth and Thirty-seventh hereof with the same force and effect as if here fully set forth.

THIRTY-NINTH: If it should be held that said voyage was not broken up, terminated and abandoned twenty-four hours after the "*Portmar's*" arrival in good safety at Port Darwin and unloading or being free to unload all of her

cargo, and that said policies and each of them by the terms and intent did not thereupon expire and terminate; the *"Portmar"* thereafter sailed from Port Darwin February 4, 1942, and arrived at Wyndham, Western Australia, February 8, 1942, where she remained in good safety for more than twenty-four hours and there discharged all of her cargo, including additional cargo loaded at Port Darwin; and the libelant thereupon, or previous thereto, gave up all intention of proceeding with the insured voyage either then or at any other time, and the said voyage was thereupon (if not previously) broken up, terminated and abandoned, and the said policies and each of them by their terms and intent, expired and terminated; and the *"Portmar"* thereupon entered upon new voyages and adventures not within the provisions of the said policies, and not within the coverage intended thereby, and neither subordinate to nor connected with the insured voyage; and respondents and each of them were thereby discharged with respect to any and all loss and damage to the *"Portmar"* thereafter caused or incurred.

Further Answering Said Libel and for a Third, Separate and Complete Defense Thereto, Respondents Allege, On Information and Belief:

FORTIETH: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth, Thirty-seventh and Thirty-ninth hereof, with the same force and effect as if here fully set forth.

FORTY-FIRST: The libelant represented to the respondents and the respondents subscribed and issued the policies hereinabove referred to upon the express representation and understanding, that the *"Portmar"* was a merchant vessel and would be engaged as such on the insured voyage, and that the insurance so effected was to cover only a vessel

used in trading and not as a public vessel engaged in warlike operations.

FORTY-SECOND: On or prior to February 13, 1942, without the consent or knowledge of respondents, the status of the "*Portmar*" was changed from a merchant vessel trading under the libelant's management and control to a war ship engaged in warlike operations and operating as a troop transport; and thereafter the "*Portmar*" was intentionally exposed to enemy attack in an active war area, and sustained the damages referred to in the libel in such enemy attack. Even if said policies be held not to have 242
previously expired and terminated, the foregoing facts were in violation of libelant's said representations and the intent and understanding of the parties hereto, and the said policies therefore did not cover or insure the said vessel after she ceased to be employed in commercial trade, and after she was employed as a troop transport; and respondents are, therefore, not liable for any damage or loss arising under said conditions.

Further Answering Said Libel and for a Fourth, Separate and Complete Defense Thereto, Respondents Allege, Upon Information and Belief: 243

FORTY-THIRD: Respondents repeat and reallege each and all the matters alleged in Articles Thirty-sixth, Thirty-seventh, Thirty-ninth and Forty-first and Forty-second hereof with the same force and effect as if here fully set forth.

FORTY-FOURTH: Respondents are not liable under the terms and intent of the policies hereinabove referred to, and libelant is not entitled to recover thereunder from respondents, for any alleged loss, damage or expense which was occasioned by or resulted from the intentional exposure of said vessel to enemy attack in an active war area.

244 *Answer, Dated July 16, 1947.*

Further Answering the Libel and as a Defense and Set-off Thereto, Respondents Allege, on Information and Belief:

FORTY-FIFTH: Each of the aforesaid policies provides:

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium
245 paid if required."

FORTY-SIXTH: If it should be held (contrary to the respondents' contention) that said voyage of the *"Portmar"* was not broken up, terminated and abandoned on or prior to the 13th day of February, 1942, and the said policies of insurance thereupon and thereby terminated; the voyage of said vessel as represented by the libelant and as agreed by the parties was changed to a voyage from Port Darwin to Koepang on the Island of Timor at a time when it was known the Japanese armed forces were attacking the Island of Timor and particularly the port of
246 Koepang with bombs and gunfire, and that the Harbor of Koepang was so dangerous that the United States battleships and other ships of war refused to enter the said harbor. By reason of the foregoing, if it be held that there was merely a deviation or change of voyage and that the policies aforesaid still covered the *"Portmar"*, the respondents are entitled to receive an additional premium for such deviation or change of voyage.

FORTY-SEVENTH: The fair and reasonable additional premium for such deviation or change of voyage is 100% of the value of the vessel as agreed in the said policies of insurance, viz. $860,000.

Answer; Dated July 16, 1947. 247

Further Answering the Alleged First Cause of Action in said Libel, and for a Separate Complete Defense Thereto, Respondents Allege on Information and Belief:

FORTY-EIGHTH: The insurance policies on which this suit is brought provide:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value." 248
>
> "In ascertaining whether the vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."
>
> • • • • • •
>
> "The provisions of the attached policy with respect to a constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

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At the time of the attempted notice of abandonment, on or about April 8, 1942, referred to in Article Sixteenth of the libel, the *"Portmar"* was safely afloat and the expense of recovering and repairing the *"Portmar"* plus all other expenses of the libelant are estimated by the libelant in Article Thirty-Fourth of the libel as $250,000, which amount is considerably less than one-third of her insured value ($860,000). By reason of the foregoing, even if the said policies were in force and effect after February 13, 1942 (which respondents deny), libelant was not entitled to declare the *"Portmar"* a constructive total loss, and the libelant's attempted abandonment of the vessel to the respondents on or about April 8, 1942, was void and of no effect. In view of the explicit policy provision above

250 *Answer, Dated July 16, 1947.*

quoted, the argument as to "high probability" incorporated in Article Sixteenth of the libel has no application.

Further Answering the Alleged First Cause of Action in Said Libel and as a Defense and Set-off Thereto, Respondents Allege, on Information and Belief:

FORTY-NINTH: If it should be held (contrary to the respondents contention) that the said policies of insurance
251 were in full force and effect on April 8, 1942, and that the attempted abandonment on that date was valid and effective, respondents are entitled to receive all charter hire and other earnings of said vessel arising and/or accruing on and after February 19, 1942 (the date of the Japanese air attack at Port Darwin) as well as the value of said vessel as requisitioned by the United States of America, War Shipping Administration and Maritime Commission, which said earnings and compensation for requisition the libelant has, on information and belief, failed and neglected to demand and collect. Respondents do not know at this time the amounts of the foregoing.

252 FIFTIETH: All and singular the premises are true.

WHEREFORE, respondents pray that the libel herein be dismissed with costs, or, if any sums are found due the libelant, that the same may be reduced by the amounts due respondents under the aforesaid set-offs, and that the respondents may have such other and further relief as may be just and proper.

MENDES & MOUNT,
Proctors for Respondents,
Office & P. O. Address,
27 William Street,
Borough of Manhattan,
New York 5, N. Y.

(Verified by Russell T. Mount, July 16, 1947.)

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Testimony.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware corporation,
Libelant,
vs.
UNITED STATES OF AMERICA,
Respondent.

A. 129-295.

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CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
vs.
SYDNEY KEITH SCOTT, one of the Lloyds Underwriters, EDINBURGH ASSURANCE COMPANY, LTD., *et al.*,
Respondents.

A. 133-332.

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Before:

HON. SYLVESTER J. RYAN,
District Judge.

New York, January 18, 1951;
10.30 a. m.

Appearances:

KIRLIN, CAMPBELL, HICKOX & KEATING, Esqs., Proctors for Libelant; EDWIN S. MURPHY, Esq., IRA A. CAMPBELL, Esq., and HELEN C. CUNNINGHAM, Esq., of Counsel.

256 *Opening Statement.*

IRVING H. SAYPOL, Esq., United States Attorney, Proctor for Respondents in A. 129-295; By EDWARD L. SMITH, Esq., Attorney, Department of Justice.

MENDES & MOUNT, Esqs., Proctors for Respondents in A. 133-332; R. T. MOUNT, Esq., and W. B. HALL, Esq., of counsel.

The Court: Gentlemen, we call for trial two suits in
257 admiralty, Calmar Steamship Company, Libelant, *vs.* Sydney Keith Scott, *et al.*, respondents, Admiralty 133-332; and Calmar Steamship Corporation, libelant, *vs.* United States of America, respondent, Admiralty 129-295.

I understand that it is agreeable that both these suits shall be tried simultaneously and that the Court may consider the evidence presented as evidence in both these suits.

Mr. Murphy: That is consented to.

Mr. Smith: That is agreed.

Mr. Mount: That is right.

The Court: We should fix the order in which we will proceed with reference to the presentation of proof and with reference to examination of witnesses.

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(Discussion off the record.)

The Court: This will be the tentative order of presentation of proof and examination of witnesses, and this order will be subject to change as we proceed, we will hear the libelant, then the United States of America and then the underwriters.

Mr. Mount: I think that is logical.

Mr. Smith: Yes.

The Court: I think we should have a brief opening statement on the record from each of the parties.

I will hear Mr. Murphy first, and take your time.

Mr. Murphy: May it please the Court, this is an action by the shipowner, the owner of the SS. *Portmar*, against

the war risk underwriters of this vessel for damages sustained by enemy attack on that vessel in the harbor at Port Darwin, Australia, and at sea just preceding the attack in the harbor in February 1942.

I stress the basic fact that it is an action against the war risk underwriters because the damage sustained by the vessel was unquestionably caused by the consequences of hostilities and warlike operations which are insured against in the policies.

The form of the insurance involved in this case is the American Marine Institute Hull 1941 form and is substantially in the same form that was involved in the case of the *John Worthington*, YMS 12, which your Honor decided two years ago. The insurance, your Honor will find, is a basic marine policy with an f. c. & s. clause printed in it which excludes from the marine policy all consequences of hostilities and warlike operations, and there is then attached to the marine policy a war risk endorsement under which the war risk underwriters take upon themselves all risks excluded from the basic marine policy by the f. c. & s. clause. 260

In this case, however, there is an additional provision in the form of a rider which is attached to the war risk endorsement, and that rider specifically provided for and contemplated the very events which happened in this case. 261

The claim of Calmar Steamship Corporation is, therefore, against these war risk underwriters, first and foremost, for a constructive total loss of the steamship *Portmar* by reason of damages she sustained in the Timor Sea and at Port Darwin between February 16th and February 19, 1942.

If the Court finds that a constructive total loss did not occur, despite our contentions, then the claim of Calmar Steamship Corporation is against these war risk underwriters for the actual losses sustained as a partial loss under the same policies.

requisitioned—if Calmar Steamship Corporation was the owner at the time of requisition.

Many of the items which are claimed as a partial loss have not yet been incurred by actual payment of money by Calmar Steamship Corporation. Some of them have and some of them have not. Those which have not have been legally sustained because Calmar was the owner at the time the ship was damaged and thus the underwriters are liable for a partial loss whether the repairs are made or not because the ship has been damaged to that extent. But I wish to point out to the Court that Calmar will sustain
293 those actual money damages in a payment sense when the United States effects a reduction of what the sound value of the Portmar would have been on the date of requisition and deducts from that theoretically sound value the amount of damage which the vessel had sustained and will pay Calmar only the damaged value of the vessel. In that sense Calmar will sustain the actual money damages.

I make that statement in order to make clear that Calmar hasn't yet paid, for example, the cost of the towage. That was paid by the Army. It hasn't paid anything with respect to repairs. That was paid by the United States either through the Army or the War Shipping Administra-
294 tion. It has paid the salvage award which was ultimately determined. True, it came out to a fairly small amount but no one knew that it would.

It has incurred certain sue and labor expenses. That is an expression taken from the marine policy, which provides that in the event of loss the assured shall sue and labor for the benefit of the underwriters. It simply means he must do all he can and incur every reasonable expense to protect the property and minimize the underwriter's loss, and, if he does so, the underwriters will pay whatever expenditure he makes for their benefit in that respect.

So the Calmar Steamship Corporation claims against the war risk underwriters for a partial loss and, first and foremost and throughout this case, Calmar's position is that

these war risk underwriters were on this risk throughout and should not be allowed to evade their just liability under their own contract, for which they were paid their required premium.

The Court: Now, Mr. Smith.

Mr. Smith: If the Court pleases, I think at the outset the United States ought to make it very clear as to the exact capacity in which it is involved in these proceedings. We were basically a shipper of Army supplies and materiel.

This ship had not been demised to the United States. We did not take the ship over and run it as a Government vessel. We merely made a contract of affreightment to 296
carry supplies to the United States armed forces in the Philippines, in the form of the voyage charter for a round trip from West Coast ports to the Philippines.

The charter party was actually put upon a so-called time charter form of charter, but it was basically a voyage charter.

We take the position that the charter party contemplated that the owner would operate the ship, that the owner would take all of the operator's risk of this ship, and that he would insure himself against all of the risks which an owner, a prudent owner at that time would insure himself against, 297
and that he would add the cost of that kind of insurance to what he was to get under the charter party, but the United States did not insure the vessel. We were not insurers. We were shippers.

To interpret the agreement which the United States made, you have to consider the situation in which the parties found themselves. The United States was acting as the Arsenal of Democracy. The Lend-Lease Act had been in force for a good long time. The *Robin Moore* had been sunk by German submarines many months before. The Congress on November 17th, before the date of this charter, had authorized the President to arm privately-owned American merchant ships, and they were being armed. Last-minute negotiations were in progress in Washington with the Japanese in a last effort to stave off war.

298

Under those circumstances, this ship was sailing at a time when war was imminent, when everybody knew that war was imminent, and the question of who was going to be responsible for the war risks was a matter which everybody made very certain of before they entered into a shipping contract.

This contract provided that the owner might insure against war risk and, if he did do that and submitted his insurance to the Government, that the Government would pay the premium or, in the alternative, the Government might elect to insure. But in this case the owner did insure against war risk and he looked to that insurance for his protection.

299

The events that happened after the charter was made have been outlined by Mr. Murphy, I think, very fairly on the whole. The vessel loaded Army supplies and materiel and proceeded to the Philippines under naval routing orders.

The naval routing orders were not given to this vessel because the United States owned the cargo aboard it. Naval routing orders were given to every ship that plied either the Atlantic or the Pacific at that time. They were orders which the Government gave to all ships as a sovereign in view of the threatening situation in which the nation was.

300

The vessel proceeded pursuant to those naval orders, military orders, until Pearl Harbor. There were then general orders issued to all ships at sea at that time in the Pacific to proceed to friendly ports. Shortly thereafter the Navy issued specific orders to various ships, that were bound for the Philippines, to go into the Fijis for further routing orders in view of the outbreak of war.

The *Portmar*, after first running a little bit to the south of her course, by virtue of the master's own decision that that was the safest thing to do, followed the specific orders that he received and went to the Fijis. The Fijis were south of his original course and were safer waters under all the circumstances.

262 The claim of Calmar Steamship Corporation, as stated in the libel against the United States, which is the second action which your Honor read into the record when these proceedings began, is an alternative action. If your Honor finds that there was a constructive total loss under the war risk insurance, then the action against the United States will be withdrawn.

The action against the United States claims charter hire which, by the terms of the charter, would cease if a constructive total loss under the policies occurred. That 263 is the first cause of action against the United States.

The two other causes of action against the United States are predicated on the alternative that your Honor may find, and in accordance with the contentions of the underwriters, that they aren't liable at all for the damages sustained by the *Portmar* and were, to put it briefly, off the risk at the time of the casualty.

If your Honor comes to that conclusion, then the second and third causes of action against the United States claim indemnity from the United States on the ground that the very events which caused the underwriters to be discharged from liability were events caused and perpetrated 264 by the agents of the United States and, thus the United States is bound in both express and implied contract to indemnify the owner of the *Portmar* for the recoveries it would have made against the underwriters if they had not been discharged from liability.

The questions involved in the suit against the United States are many and complex. They need not be considered at all if, in the first action, the decision is that the *Portmar* constituted a constructive total loss by reason of the damages sustained by enemy attack. And only the first cause of action against the United States need be dealt with, that is, the claim for charter hire, if the Court finds that the *Portmar* was a partial loss and that the war risk underwriters are liable for the partial loss.

The war risk underwriters have pleaded a variety of defenses and have tried, by every possible twist, to escape liability for the risk that they undertook under these policies.

There is no question about the issuance of the policies. There is no question that they were paid the premium. And there is no question that they wrote these policies at a time when all the world knew that matters were moving toward a crisis in the Pacific. But now that the damage has occurred, the underwriters have striven by every artifice to escape this claim. 266

I do not propose to deal with all the defenses that are pleaded. They have been discussed in the trial briefs that are already before the Court. I simply wish to point out two considerations that I would like the Court to bear in mind as it receives the evidence in this case, and that is that the underwriters have sought to claim that when the *Portmar* was diverted by United States naval orders to Suva in the Fiji Islands, and there directed to proceed to Australia, also by naval orders, they have made the contention that they insured the vessel by special agreement only to Australia, and they have contended that they were discharged from liability when the vessel arrived at Sydney, Australia, and lay there for 24 hours in safety. That 267 contention flies in the teeth of the cable which requested that the underwriters hold the *Portmar* covered by reason of this diversion, and we shall show your Honor the precise language of that cable.

The next point that I wish to call your Honor's attention to is that the underwriters appear to place considerable emphasis on a contention that everything that was done by the *Portmar* on this voyage was voluntary because the United States was constituted as the agent for Calmar Steamship Corporation to give orders to the vessel.

That theory is entirely unsound and contradicts the established nature of a time charter, or a voyage charter on a time basis, and we shall show the Court that under

the kind of charter involved in this case, the owner was the owner of the vessel, the master and crew were his servants; the owner was the operator of the vessel. The United States was entitled to the use of the carrying space of the vessel under a time charter and this charter was for a voyage on a time basis and therefore there was no agency whatever, and what happened was that the United States, and in its sovereign capacity, gave orders to this vessel which, of course, the master of the vessel was bound to comply with. Everything that was done was absolutely involuntary on the part of the vessel, her master and her
269 crew.

The reason for my mentioning those points is that the facts of the case show that the *Portmar*, while on a voyage to Manila and return, was diverted by naval orders when the Japanese attacked Pearl Harbor and sent to Australia; and from there on, every single move the vessel made was pursuant to orders either of the United States naval authorities or as delegated to the British naval authorities in the Fiji Islands, or, as again delegated, to the Australia naval control in Australia, or as given by direct agencies of the United States, namely, the United States Army authorities at the various Australian ports.

270 The facts, in brief, are as follows: The *Portmar* was chartered to the United States for one round voyage, San Francisco to Manila, Philippine Islands, and return, either at a U. S. Atlantic or U. S. Pacific port.

The charter was made as of November 21, 1941. The war risk insurance was written and issued by a binder November 26th and November 27, 1941.

The vessel sailed from San Francisco laden with United States Army supplies for Manila.

The vessel was chartered to the Maritime Commission and was allocated to the War Department and was laden with United States Army supplies for Manila.

She sailed on November 28, 1941. Before she sailed the United States naval authorities at San Francisco gave

the master sealed orders, and in those orders were successive positions through which he must pass in making the voyage. Those positions routed the master a few hundred miles south of Hawaii and down close to New Guinea and over through the Torres Strait north of Australia, thence west through the Arafura Sea, thence north to the Philippine Islands. The sealed orders also imposed radio silence on the master after he passed a position a short distance outside of San Francisco.

The master followed those orders until the morning of December 7th when the radio brought the news of the attack 272
on Pearl Harbor. The master, realizing that the naval course laid down for him carried him very close to Fanning and Christmas Islands, if not between them, that were ahead of him, and knowing from his prior experience that there were cable stations on those islands and figuring that if the Japanese had attacked PearlHarbor they would certainly be at Fanning and Christmas Islands, where the cable landings were, and fearing if he continued on that course he would sail right into capture or destruction, not receiving any orders as to what to do, he turned to the left and headed south, intending to wait until he received orders from the Navy as to what to do in view of this 273
crisis that had occurred.

Four days later, on December 11, he receives the order he expected. It directed the *Portmar* and other vessels to proceed to Suva in the Fiji Islands and there take orders from the British naval authorities.

The master complied. He went to Suva and was ordered to go to Sydney, Australia, and there report to the Australian naval control. He went to Sydney and there reported, and also consulted the American Consul at Sydney and asked if he should continue to follow these orders that were given him by British and Australian authorities, and the Consul said absolutely it should be done.

At Sydney he was directed to go up the coast to Brisbane. At Brisbane much of the cargo was unloaded, sorted out,

some of it reloaded, and he was then ordered to proceed to Port Darwin on the north coast of Australia.

He complied with his orders and, in due course, arrived at Port Darwin. At Port Darwin the Australian naval control and the United States Army authorities there ordered him to discharge all of his cargo except a small quantity of drums of gasoline, about 500 drums, and thereafter they loaded enough drums to make up a total of 2,000 drums of gasoline, and the Australian naval control ordered him to take them to Wyndham on the northwest coast of
275 Australia, there discharge and return to Port Darwin. He complied and returned to Port Darwin on the 12th of February. He was ordered by the Australian naval control to shift alongside the pier the next morning to load a detachment of the 148th Field Artillery, and the United States Army authorities told him that he would cary that artillery to the Island of Timor, the Port of Koepang. The master obeyed, and the artillery was loaded on his vessel with the troops, about 300 to 400 troops and their munitions. The master was then ordered to report on board the United States Cruiser *Houston*, then lying in the harbor, which would be the military escort of the convoy. He was ordered to report there for convoy orders.

276 That night, the night of February 14th, he reported on board the *Houston* and, in the presence of Captain Rooks of the *Houston*, the Australian naval control officer gave him orders to sail in convoy of the *Houston* for Koepang, Timor.

The convoy left Port Darwin shortly after midnight and proceded out through the Timor Sea, and during the 15th, and at about noon on the 16th of February the convoy was attacked by Japanese bombers and the convoy dispersed. The *Portmar* was somewhat damaged, to what extent is not precisely known, by near misses of bombs. The *Houston* thereupon ordered the convoy to return to Port Darwin and escorted the convoy back to that port.

The convoy arrived at Port Darwin at about noon on February 18th, and the *Portmar* anchored in the harbor, awaiting further orders. On the morning of the 19th, at about 10 a. m., a devastating attack by Japanese aircraft occurred at Port Darwin and many ships were destroyed, destroyers and merchant vesels alike. The *Portmar* was heavily damaged by cannon fire, machine gun fire, and by bomb fragments from bombs falling close to her sides in that attack.

The master decided to beach the vessel to keep her from sinking in the harbor. Certain casualties occurred on board, 278
who were taken off the vessel by an Australian naval corvette. The vessel was beached on the east shore of the harbor, some miles south of Port Darwin. The troops were taken off, the crew were sent ashore and quartered at an Army camp some distance away. Thereafter the crew were repatriated and sent home to the United States. The master remained in Australia to do what he could in the interests of the vessel.

All during these events the owners of the *Portmar* had no contemporary knowledge of what was going on. They received word of the various events long after they had occurred. The master endeavored at every possible point
to send word to his owners as to what was going on but 279
was unable to do so.

When the master left the vessel for the last time, on March 3, 1942, she lay aground astern, badly listed to port. Her decks were submerged from stern to midships at high water, the tidal range there being around 27 feet. She had been seriously damaged throughout her hull. The master regarded her as a hopeless loss.

We will ask the Court to consider the situation as it existed at that time and as it continued to exist until the 8th of April 1942 because, on the 8th of April 1942 the owners, after receiving word from the master, after he got to Melbourne by traveling overland, after having received a letter from the Maritime Commission, stating what their

agents in Australia thought about the vessel, and taking into account the fact that the vessel lay 2500 sea miles from the nearest drydock, at a port where there were no facilities for repair whatever, with the Japanese air force dominating the air during daylight hours, so that work could be done only at night, with the Japanese navy dominating the sea because, your Honor will recall, the *Houston* was run down and sunk only two weeks after the attacks which I have described to the Court, and there was nothing left to oppose the Japanese navy at that time, with a full scale invasion of Australia expected from minute to minute by the Japanese forces, the owners concluded that in the high probabilities of the situation it would cost more to recover and repair that vessel than the amount of her insured value as provided in the policies and tendered the abandonment of the wreck to the war risk underwriters.

If there ever was a case of reasonable probability and high probability justifying abandonment as for a constructive total loss, this is the case.

Your Honor will recall that the master last saw the vessel on the 3rd of March because he and his crew were sent overland to Melbourne by the Army, and the crew was repatriated from Melbourne. In the interim, between that date and the 8th of April, the power of the Government began to move and they were able to do things that a private shipowner could not do. The United States Army apparently decided to salve that ship for what she could be used as a military expendable vessel, not to restore her to her former condition, but just to patch her up so she could float and move.

The Australian Government arranged that large pumps necessary to pump that vessel out be sent overland a couple of thousand miles by rail and across the desert by trucks to Darwin. They sent a salvage expert up there. Working at night time, and patching the ship, and using these pumps, and getting steam from Government craft to work the pumps, he succeeded in pumping the water out of the vessel,

and floating it, so that she would float at anchor in her patched condition. The facts on April 8th were that she had been floated on April 5th. She was no longer aground on April 8th but every other fact that I have described, which existed when the master last saw her, still applied. She was lying afloat at anchor, with the pumps going day and night to keep her afloat, and the prospect of ever getting her towed to a port of repair, if it could be done at all, involving very high expense, the cost of repairs to restore her to the condition she was in before the enemy attack, if it could be done in Australia at very high probable cost, 284
and she was saddled with a salvage lien as she lay there, and what that would amount to would remain to be seen—so, putting it all together, on the 8th of April, the high probability was that that vessel was a constructive total loss.

As I stated before, she was towed eventually to Brisbane. But when? She was towed to Brisbane, leaving Port Darwin in June 1942. And what had occurred between April 8th and June? The Battle of the Coral Sea, in which the United States Navy cleared those waters of the Japanese navy and made it possible to tow the ship 2,000 miles to Brisbane. It was not known on April 8, 1942, that the Battle of the Coral Sea was going to take place on the 4th-9th of May, 285
and it wasn't known that the United States Navy and Air Force were going to be victorious. And that was the first great event that occurred after the abandonment to the underwriters which began to clear the situation up somewhat.

So the Australian Government arranged for tugs to tow her and a riding crew to ride her 2,000 miles around to Brisbane.

When she got to Brisbane the master came up from Melbourne to meet her and he arranged immediately for the best man he could find in Brisbane, the local representative of the American Bureau of Shipping, a classification society—this vessel was classed in Lloyds but American

Bureau of Shipping is the corresponding classification society in the United States—to give him a report. That surveyor, with his associate, an engineer, went over that ship and they made a written report to the captain, which stated that they estimated that the repairs necessary to restore that vessel to her pre-bombing condition were 120,000 Pounds Australian.

If your Honor will permit me, I will deal in Australian Pounds, and I will ask the Court to assume that the insured value of the vessel, $860,000, amounted to 264,615 Australian
287 Pounds, the exchange rate being 3.25.

Salvage claims were then asserted against that vessel by the Government of Australia and by the private salvage company and the individual Williams, who was the salvage expert that directed the operation, in the total sum of 150,000 Pounds Australian. We did not know then what the towage actually cost, but it has subsequently developed that the actual out-of-pocket cost paid by the United States Government to the Australian Government amounted to a total of 17,973 Pounds Australian. That takes no account of military labor that was engaged in it. That is the actual expenditure. The total of those three items alone exceeded the insured value.

288 So, on the high probabilities of April 8th, if the subsequent events are to be considered at all, the first intelligence that the owners received as to the costs involved in repairing that vessel, justified their estimate of the situation on the 8th of April.

Using a large amount of military labor, the vessel was cleaned up to a considerable extent and a lot of work done on her at Brisbane. What was done we don't know. She was in the hands of the Army. As I said, the Army decided to patch her up as an expendable ship, and they did all this work.

She was then moved to Sydney under her own steam and there a joint survey took place, after she had been put on drydock. It turned out, when she got on drydock, that her

bottom was damaged to a very slight extent, although the estimate before had been that her bottom had been seriously damaged. The joint survey at Sydney reported that the amount of repairs necessary to restore the vessel to her prior condition—doesn't say for classification, but it may be assumed that that is what they meant—would amount to 28,000 pounds Australian. That report was made in February 1943, a year after the damage, about nine months after the abandonment to the underwriters, after a vast amount of work had been done on her; and after the actual condition of the vessel had become actually known and 290
ascertained.

That survey report at Sydney is a fact, but it cannot outweigh the other facts of the case as affecting the high probabilities of the situation as they faced this shipowner on April 8, 1942.

The underwriters rejected the abandonment of April 8th but agreed that the assured would be in the same position as though he had actually started suit on that day. That is the usual practice. Thus, April 8th is the critical date to determine the high probabilities which justified the tender of abandonment.

I think that gives your Honor an outline of the situation. 291

Calmar Steamship Corporation, as libelant, therefore claims to recover from the underwriters for a constructive total loss. If the Court should find, despite the evidence and our contentions, that there was not a constructive total loss, Calmar Steamship Corporation claims from the underwriters recovery of their actual cost and expenses as a partial loss.

I should say, before closing, that while the vessel still lay at Brisbane, the United States requisitioned title to the Portmar November 17, 1942. On that date the United States became the actual owner of the damaged vessel and, of course, is liable to pay to Calmar Steamship Corporation just compensation for the value of the damaged vessel as

When he arrived in the Fijis he got further routing orders, sovereign orders, given him by the Navy, not because the cargo was United States cargo but because all ships bound to the Philippines at that time had to be diverted because war had broken out and had to be routed south of the usual lanes to the Philippines. 301

The master followed those routing orders which the Government gave, not as charterer but as sovereign, and proceeded to Sydney.

At Sydney he reported to the Army authorities and the Army authorities in Australia for the first time learned that he had Army supplies, Army materiel, useful military equipment aboard, and the Navy, through the Australian routing control office, gave him routing orders carrying him up toward Darwin. 302

The situation in Australia at that time was critical. We intend to show just how critical it was. The Japanese were at the point of their greatest expansion. The Navy had withdrawn from the waters north around Port Darwin, invasion was momentarily expected, the islands of the East Indies were under Japanese attack, Japanese invasion, and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated. They were not inquiring into whether the United States was the charterer, or the property belonged to X, Y or Z. They were finding out what ships were in Australian waters, what material was available to the armed forces of the United States and of Australia to meet the Japanese threat, and were ordering that material sent where it was needed most. 303

After the Army learned of the nature of the *Portmar's* cargo, after it had been given details as to the *Portmar's* characteristics and so forth, the Army gave military orders, which the master received in Brisbane, to have the materiel taken off the vessel, sorted, accurately appraised for usefulness, and gave other orders which caused a good deal of

it to be reloaded together with certain other cargo, and the material sent up to Port Darwin where the invasion was expected.

She unloaded her cargo at Darwin for the most part. A little bit of it was sent on to Wyndham. She came back and she received military orders again to proceed from Darwin to Timor with military supplies, artillery and some artillery officers and men. Those orders were not given by the United States as charterer. Those orders were given as military orders by military people faced with an immediate invasion. She proceeded to join a convoy and was given
305 the usual convoy instructions at a convoy conference. She proceeded enroute to Timor until she reached a point that was not very far from the point through which she would have passed if she had followed her original naval routing instructions, and at that point the Japanese air force spotted the convoy, attacked it and badly shook up the *Portmar* with the concussion of near misses and caused the convoy to turn around and go back to Darwin.

At Darwin she was attacked again. I think Mr. Murphy has described what took place there so well that I needn't go into it at any great length, but I do want to point out that at Darwin she had not had an opportunity to unload
306 her military supplies and equipment, and particularly her artillery, when she was so badly damaged that her master beached her and abandoned her as a total loss.

The Army authorities, as a military proposition, wanted to get the artillery off the *Portmar* and they arranged to have her surveyed from the point of view of getting her afloat so she could unload her artillery, which they desperately needed. In the course of those surveys it was determined that she could be kept afloat and gotten to Brisbane where she might be patched up.

The situation in Port Darwin was such that no commercial salvagor could be induced by commercial interests to risk putting equipment and men into a venture for salvage purposes. This was a military decision to salve the vessel.

It could not have been done by a commercial owner. It was a decision made to risk the lives and equipment of the military in order to get military equipment that was needed at a point of military advantage, and you cannot assess the out-of-pocket cost of the military in any such operation as being the cost to the owner of having any such operation performed.

The military successfully performed the operation of getting this vessel afloat, and through arrangements made by the military with the Australian Commonwealth Salvage Board this vessel was towed back to Brisbane, at a time 308
when the Japanese submarines were active in the area, at a time when the entire route was subject to Japanese aerial attack, by proceeding at night, hiding in coves during the day, taking, I think, some 64 days in the process of bringing her back, and, as a great feat, the *Portmar* was successfully salved.

The Government intends to show that any such salvage attempt which commercial interests might arrange for could only be arranged for under a no cure, no pay salvage contract, and that the award that would be made to a commercial interest attempting to effect any such salvage would be very high.

The Army, after getting the vessel back to Brisbane, 309
proceeded to clear the indescribable mess in which the vessel was, cleaned the muck and debris off her, and then, for the first time, began to get an idea of what would be involved in fixing her up.

At that time the Army concluded that she could be patched up for use on military missions as an expendable vessel and decided to go ahead with the patch-up job. They patched the vessel up without any thought of putting the vessel back into class or into commercial operating condition, using the labor of enlisted men for the most part, having access to a shipyard scrap pile from which they took whatever scrap materials could be used for patching purposes, having access to the wrecked hull of a Liberty ship that

had broken in two after stranding in the harbor, from which they took a good deal of material.

They got the vessel back into operating shape, formally requisitioned title to the hull, and used her for two voyages, and lost her to the Japanese by torpedoing.

On that state of facts the Government contends, first, that this proceeding is not proper; that the proper remedy, if any, that the owner has against the Government for the relief sought in the libel in this action should be obtained in the Court of Claims. A rather technical question, and I think it has been discussed fully in the Trial Memorandum.

311 Briefly, we say that if the *Portmar* should be considered as a vessel of the United States at all, she was a public vessel of the United States and that a suit upon a contract with respect to the operation of a public vessel of the United States is not cognizable in the United States District Courts, but should have been brought in the Court of Claims.

But on the merits, our contentions are four. We say, first, that this loss was within the coverage of the insurance which the owner took out for his own benefit and for the benefit of the United States, and that no question arises as to whether the United States is liable for the damage sustained by the vessel in Darwin because the underwriters

312 are liable, and that the insurance is for the benefit of both the vessel's owner and the United States.

We say that everything that the vessel did from the time it left San Francisco until it was beached was either in pursuance of the original voyage on which the vessel sailed, or was following compulsory military orders which a vessel's master is always under a moral obligation to follow, and not only a moral obligation but a very physical compulsion to follow, and that none of those changes from the original itinerary had the effect of relieving the underwriters of liability.

The Court: You would not say that a change of itinerary was justified by a moral obligation?

313

Mr. Smith: I think the case law is very clear that if the lawful authorities give a lawful order, there is no obligation to resist that order.

The Court: Then it is compulsory.

Mr. Smith: It is compulsion, even though the authority doesn't happen to be able to physically enforce it at the moment.

The Court: It is more than a moral obligation. It is compulsion.

Mr. Smith: That is true.

The second point I make is that if, by any chance, there was some event which destroyed the coverage, the insurance, the United States is not liable for the loss because we did not assume liability as insurer for any damage which this ship may incur; that the damage is not the result of any charterer's order, but of military orders, sovereign orders, with respect to which the United States is not liable as a charterer. 314

The third point is a rather technical one, that if, by any chance, the actions of the military authorities be regarded as amounting to a taking of the ship for a period which would prevent the vessel from ever completing the original voyage, or the original purpose contemplated by the charter party, such action may have had the effect of frustrating the charter party, in other words, putting an end to it, by reason of creating a change in circumstances which was not contemplated by anyone that was a party to the contract at the outset, and that the law is that when a charter party or other contract has been frustrated, the courts will not enforce any obligation whatsoever contained in such a frustrated contract. The loss, in case of frustration, is left by the courts to lie where it falls and no action upon such a frustrated contract may be maintained. 315

With respect to the liability of the United States to pay charter hire after the vessel was beached and abandoned, we take the position that the vessel was a constructive total

loss within the meaning of the charter party at the time it was abandoned, and that by the express terms of the charter the Government's obligation to pay hire ceased.

We say that the meaning of a constructive total loss in the charter party is not the same as the meaning of total constructive loss in the insurance policies. We do not consider a decision that the vessel was or was not a total loss within the meaning of her insurance policy has any bearing on the question of whether she was a total constructive loss under the meaning of the charter party. The charter party was a marine contract made before any insurance
317 was taken out. It was made without any reference to a formula for determining whether a vessel is a constructive total loss, and with reference to the American definition of a constructive total loss, which is that, a vessel is deemed to be a constructive total loss, if at the time of the vessel's casualty the high probabilities are that it would cost more than half the ship's value to restore her.

We say, further, if by any chance the Court finds she was not a constructive total loss within the meaning of the charter party when she was beached and abandoned, we are not obliged to pay any additional charter hire beyond that date because the owner, as it has represented in this court,
318 elected to treat her as a constructive total loss and made no further effort to fulfill its obligations under the charter party.

Under the charter party the owner was obliged to use due diligence to put the vessel back into seaworthy operating condition. The owner thought she was a total loss and made no effort to do so. And having elected to treat the charter party at an end, having failed to take any steps whatsoever to fulfill its obligation, it is estopped from claiming hire for the period after the beaching.

(Short recess.)

Mr. Mount: May it please the Court, the facts of this case are a very vivid story of how a vessel started as a commercial vessel on a round trip to the Philippines and back to the U. S. Pacific Coast and ended as a warship, loaded with soldiers, guns and ammunition, a unit in an invasion expedition of foreign territory for the capture of the Port of Koepang, which had already been bombed by the Japanese. 319

The argument of the libelant is that the underwriters insured those final stages of the operation of the *Portmar* when they insured her as a commercial vessel for a round trip at a premium of one and a half per cent. 320

I will ask the Court to take judicial notice of the amount which you as an individual, or, rather, the rate that you as an individual pay for insurance against fire, against burglary, or what not. As Judge Storey said, "The rate of premium charged by underwriters is not determinative of the risks which they covered but is very significant of whether they covered usual or unusual risks."

We must consider what was in the minds of the parties when the charter party was made and when the policies of insurance were made.

The Court: How does that become material unless there is some ambiguity in the policy? I mean, how does the rate of premium—you will pardon me for interrupting, but that thought comes to me—how does it become material what rate of premium is charged if the policy is clear and definite in its terms? 321

Mr. Mount: If there is no doubt in the words used, then I take it that the rate of premium is something that was decided by underwriters——

The Court: Do you argue, so I can understand you—I don't want to interrupt your opening, but the purpose of these openings is to fix my attention on the issues—do you claim that the terms of the policies are ambiguous?

Mr. Mount: I claim that the rider of the policy, which is what the libelant relies on principally, can be explained as

a matter of logic and in the light of certain decisions, one by the Circuit Court of Appeals here and another by the Supreme Court, but that the Court might think that there was ambiguity in that clause and, if there is any ambiguity, it must be construed against the party who proffered the clause, namely, the libelant's own broker.

The Court: Do you urge that the terms of the policy are ambiguous?

Mr. Mount: I don't think so.

The Court: All right. Do you urge that they are ambig-

323 uous?

Mr. Murphy: Not at all, sir.

The Court: Mr. Smith stands by the side on that. He has nothing to do with that.

So there is no contention by either the libelant or the underwriters that the policy, in its terms, is ambiguous?

Mr. Mount: No.

The Court: Then I don't see how the rate of premium comes in, or how the intention of the parties comes in.

Mr. Mount: Well, the Courts have said that even where there is no ambiguity, the rate of premium can be considered. However——

The Court: I don't see it, Mr. Mount.

324 Mr. Mount: I rely on the facts and the wording of the documents.

The Court: Yes. Let me ask you a question, now, just for my guidance as you continue, does it disconcert you or does it interrupt your chain of thought for me to ask questions as you outline your case?

Mr. Mount: I would be very glad to have you ask questions.

The Court: If it does, I will save any questions I have until you are through.

Mr. Mount: I should be glad to know how your Honor's mind is working as we proceed.

The Court: All right.

325

Mr. Mount: The Court must consider what was in the minds of the parties when the contract was made. The charter party to the Maritime Commission expressly states that it was a hire of the vessel for trading for one round voyage to the Philippines.

Referring to a remark which Mr. Smith made, that the insurance was for the benefit of the United States, I point out that the charter party expressly provides, on the question of insurance, and this is in article 2.17, that insurance shall be provided on the vessel which shall be made payable to the owner, that is, the war hull insurance. When it comes to liability insurance, it is specifically provided that war risk protection and indemnity insurance for the benefit of the owner and the charterer, as their interest may appear, shall be taken out. In other words, the insurance which is indemnity insurance, that is, protection insurance for liability, shall be taken out for the benefit of both the owner and the Government, but on the hull itself the only provision is that the insurance shall be taken out payable to the owner.

326

I also have one more clause to refer to in the charter, which provides, and this is in article 2.11, the charterer shall indemnify and hold harmless the owner, the master and the vessel from all consequences and liabilities whatsoever arising from compliance with any orders or direction of the charterer or its agents.

327

As to the insurance policy, that is headed in the upper left-hand corner—it mentions Calmar Steamship Corporation as the assured, and in capital letters says "For account of themselves." It doesn't say "For account of whom it may concern," nor does it mention the United States. Our relations are solely with the Calmar Steamship Corporation.

In that policy is described the limits of our insurance in these words, "at and from United States Pacific port to port or ports in the Philippine Islands, whilst there, and return to United States Pacific port or United States Atlan-

tic port via Panama Canal, while in port for 24 hours after arrival."

Then it also has the held-covered clause, which reads, "held-covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium paid if required."

And then finally there is the rider which excludes claims arising from capture, seizure, arrest, restraint, detainment, requisition, nationalization or condemnation by or
329 under the authority of the Government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them, but unless the insured vessel is condemned, and this vessel was not condemned, this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, and then it includes even marine losses, or by stranding, sinking, burning or collision, providing such losses would not be covered by a marine insurance policy (in the form hereto
330 attached) warranted free of claims arising from capture, seizure or detention.

The first point of our defense is that the voyage which we insured had terminated before the event of her damage. There was the policy description of what we insured.

You remember she arrived at Sydney, was sent on to Brisbane, discharged half her cargo there, was sent on to Darwin and discharged almost the balance of her cargo there, and then was sent on to Wyndham with what was left, about 2,000 drums of gasoline, and the last of her cargo was discharged at Wyndham. While she was at Darwin, Calmar learned that she had been diverted to Australia and their brokers sent a cable to the London brokers, which reads—this is stipulated—which reads, "*Portmar* diverted to Australia on outward voyage under Govern-

ment orders Stop Hold-covered pending further advices." That was shown by Stephens to underwriters, and Stephens wrote back—Stephens being the London broker—wrote back to Mather, the Philadelphia broker of the libelant, by letter, which is also stipulated——

The Court: Stephens was the agent of the underwriters?

Mr. Mount: No, Stephens is the agent of the assured. I will cite cases that the broker employed by the assured——

The Court: Yes.

Mr. Mount: —is the agent of the assured. 332

The Court: But I thought that Stephens was the managing agent of the underwriters.

Mr. Mount: Oh, no.

The Court: He is not? All right.

Mr. Mount: You agree with me that Stephens is a London broker——

Mr. Murphy: In part that is correct. Mr. Mount is quite correct. They are our agents for some purposes, your Honor will find in this case. In some respects they acted as agents for the underwriters. They had a dual capacity.

The Court: Ordinarily I would assume he is the agent of the assured. 333

Mr. Mount: That is true.

The Court: I didn't know whether they function in this case as a broker or agent for the underwriters. In this case you claim that Stephens functioned as the broker——

Mr. Mount: Broker.

The Court: —and not as an agent for the underwriters?

Mr. Mount: That is correct.

Stephens wrote back to Mather—Stephens and Mather are correspondents——

The Court: I have the situation.

Mr. Mount: (Continuing) Wrote back, "We have your" —this cable was sent the 24th of January 1942 while the *Portmar* was first at Darwin—"We have your cable of

the 24th January last advising that this vessel insured for the voyage from the U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all underwriters on our war risk policies have agreed to hold this diversion covered pending your further advice."

That changed the insured voyage from a round trip to the Philippines and back, let us say, to a round trip to Australia and back. That is the broadest interpretation, certainly, that anybody can give to it.

335 The Court: That is putting a limited construction on it.

Mr. Mount: I beg your pardon?

The Court: That seems to me to be putting a limited construction on it but, all right, I will study that.

Mr. Mount: Yes, all right. They say that the underwriters have agreed to hold this diversion covered.

The Court: Until further word.

Mr. Mount: No, they don't say that.

The Court: What is that last clause?

Mr. Mount: That is what Mather asks.

The Court: That last phrase you read there.

Mr. Mount: About the underwriters?

336 The Court: What does Stephens say? What is last phrase of Stephens' letter?

Mr. Mount: "Have agreed to hold this diversion covered pending your further advices."

The Court: Further advices?

Mr. Mount: Yes, and this cable was sent referring to it as a diversion on the outward voyage.

The Court: All right.

Mr. Mount: At Wyndham the last of the cargo was out and the vessel was then ordered back to Darwin. Wyndham is west of Darwin. And as has been explained the vessel on February 13th and 14th was loaded with three to four hundred U. S. soldiers, field guns, ammunition, and was ordered to go to Koepang.

The Court: Where do you claim the coverage ended on the voyage, at what point?

Mr. Mount: We say that the coverage ended when there was a determination to do something with the vessel other than make it a round trip back to the United States.

The Court: Where do you claim the vessel was when your coverage ended?

Mr. Mount: Well, I say——

The Court: Do you claim it ended at Suva?

Mr. Mount: No.

The Court: Do you claim it ended at Darwin? 338

Mr. Mount: No.

The Court: Do you claim it ended at Wyndham?

Mr. Mount: We say the coverage ended at Wyndham——

The Court: At Wyndham?

Mr. Mount: (Continuing) When the last of the cargo was out and she was then ordered to do something else.

As evidence that there was no intention to send her back to the United States, or use her as a cargo vessel, is the small detail that when she got back to Darwin the chief officer testifies that all her cargo dunnage was discharged.

The master was told to go aboard the Cruiser *Houston* 339 and, in my brief, as your Honor has read, the Commander of the *Houston* said, "Koepang is too hot a place for me. I'll take you to the entrance of Koepang. I am not going in. You will have to get in yourself."

And the *Portmar* was loaded, not only with the men and the guns and the ammunition, but she was also loaded with a landing boat for the soldiers. There was a heavy launch that was put on board of her, so heavy that it took the *Portmar's* 30-ton derrick to handle it.

Our first point is that the side trip out of Port Darwin had no connection with the voyage which we insured, that voyage having been amended by the exchange of cable and letter.

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Our second point is that even if the insurance should be held in force, it doesn't cover risks to which the vessel is intentionally exposed, and on that point the courts have held, for instance, in the case of where there was insurance against capture and the vessel sailed without ship's register and without a cargo manifest, and she was captured by a British cruiser, the Court said, "To have sailed without her documents is inviting capture, and even though capture was mentioned in the policy, the underwriters are not liable for the risk to which she was exposed in that extreme manner."

341 Then there is a case—I am speaking of cases because we haven't very much—we haven't introduced any testimony here——

The Court: How do you claim that there was a wilful exposure of the ship in this case?

Mr. Mount: Because——

The Court: I mean, I don't compare this to a sailing without proper documents which would make it subject to seizure.

Mr. Mount: Well, she was——

The Court: Here frustration is claimed to have occurred by reason of an act of war by an enemy.

342 Mr. Mount: Yes, and she was sent over towards a port which had already been bombed by the enemy as part of an invasion expedition which, of course, invited retaliation by the Japanese. The Japanese had already bombed the Port of Koepang, and on the way over towards Koepang they encountered Japanese war planes, a squadron of 27. Now, that was inviting enemy attack. It is just like the case——

The Court: It would have been subject to enemy attack anyway because it was a ship flying the flag of a hostile nation. Go ahead. The thought comes to me, on your first point, Mr. Mount—here is something that troubles me—the original policy contemplated a return voyage——

Mr. Mount: Right.

The Court: (Continuing) Return to the home port. Doesn't this cable from Stephens contemplate a continuance of the voyage and a return to the home port?

Mr. Mount: It specifies Australia. It agrees that instead of the Philippines, Australia shall be substituted, and it covers that diversion to Australia.

The Court: The mere fact that I ask these questions is not intended to indicate to any of you counsel that I have any definite opinion. I am asking them in a search to get your positions definitely defined.

Mr. Mount: I am glad to have you ask questions, sir.

344 Another case of intentional exposure to a risk which is covered in the policy is the ice case, where the policy insured against collision, and the court held that collision with ice was collision within the policy, but where the ship had been forced through an ice floe, it was not covered because underwriters do not cover risks to which the ship is intentionally exposed.

We do not deny that at the time this insurance was placed relations were strained between Japan and the United States, but we say that what our policy covered was war losses which came fortuitously, as the decisions say, to the vessel, not those losses to which she was intentionally exposed.

345 Then there is also another case, a decision by Mr. Justice Clifford, sitting on Circuit, where a vessel was time chartered to the War Department, and suit was brought against the underwriters. The policy covered perils of the sea, including stranding. The War Department ordered the vessel to cross a bar when there was insufficient water and she stranded. And Mr. Justice Clifford held that that was not covered by the perils of the sea in the policy and that——

The Court: I don't see the analogy. On this point you are urging now, I don't see the analogy of those cases where the underwriter is relieved where there is a wanton, wilful and intentional disregard of the safety of the ship.

346 Mr. Mount: Exactly.

The Court: I don't know that you have such a situation here.

Mr. Mount: Well, let me point out that this case——

The Court: Suppose the master of the ship said, "Now, I am not going to run this ship up there"? What do you think would have happened? He didn't seek out this danger. It was forced upon him, wasn't it?

Mr. Mount: May I point out to your Honor that there is no case in the books which has this situation of where a
347 commercial vessel was taken over by the Government and used as a war ship and a claim made against underwriters. You have before you a case of novel impression, and we contend that there is no difference in principle whether the master did this of his own volition or whether he did it because the United States Army said he should do it. The point which I want to make clear is that the vessel was intentionally exposed to a risk which was not within the minds of the parties when the insurance was placed, or within the words of the policy.

The next point we urge is that if your Honor should hold that the insurance still covered the vessel at this time, then the held-covered clause of the policy applies. If it covered,
348 it must be under a change of voyage, and that provides for an additional premium. We have taken testimony on that. I have referred to it in my brief.

The Court: On this cable from Stephens, it was incumbent for the underwriters to state what additional premium they requested or wanted, wasn't it? How could the owner pay until he knew what he had to pay?

Mr. Mount: Well, we haven't any libel against Calmar for additional premium.

The Court: My point would be this, as I see it: The failure to pay the additional premium under those circumstances would give you an offset for the amount of the additional premium, but would that relieve you of coverage or liability?

Mr. Mount: Of course, our first point is that coverage had terminated.

The Court: Assuming that, you would just be entitled to an offset.

Mr. Mount: If your Honor says the coverage had not terminated, then your Honor must hold, well, the policy was in force and one of the terms of the policy is the held-covered clause, if there is a change of voyage because, under no view can the sailing from Port Darwin be considered part of a voyage from the United States or to the United States.

350

As to the rider, I don't want to make my argument too long.

The Court: You go ahead. I don't want to limit anybody in these openings because they are helping me focus my attention on the issues in the case and then, as the evidence is presented, or as I read the depositions that are introduced, I will know what to look for—at least I think I will know what to look for.

Mr. Mount: This rider, as we shall show by evidence, was proposed by Mather, the libelant's Philadelphia broker. The insurance is asked for in London by Stephens, the assured's broker, making out what is known as a slip, and this is also stipulated, and going around to the individual groups of underwriters on the floor of Lloyds and to the individual insurance companies and asking, "Will you give us insurance on these terms?"

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The Court: And they take participation individually?

Mr. Mount: That is it, and the underwriters initial—someone is authorized for each syndicate in Lloyds to initial, and the companies initial——

The Court: With the amount set forth.

Mr. Mount: With the amount that they will take of the insurance. In the same way, the policy is made up by Stephens.

And I want to ask, Mr. Murphy, if you have the original policy?

Mr. Murphy: Yes, I have.

Mr. Mount: It is a printed policy, isn't it?

Mr. Murphy: Yes, certainly.

Mr. Mount: May I see it?

Mr. Murphy: Certainly. There are three, if the Court please.

There are three original policies (handing papers to Mr. Mount).

The Court: All covering the war risk?

Mr. Mount: All covering the——

The Court: All covering the war risk?

353 Mr. Murphy: All for war risk. All for various parts of a total sum of $860,000.

The Court: Why were there three policies instead of one?

Mr. Murphy: One is for Lloyds Underwriters, the other is for the companies, and one is for the Excess Insurance Company, Ltd,

The Court: I see.

Mr. Murphy: But all make up the total sum.

The Court: All right.

Mr. Mount: This policy is also prepared by Stephens and is taken around, in the case of Lloyds, taken around to 354 the Lloyds signing office and they sign on behalf of all the underwriters.

But this clause, proffered by Mather, in the first part excludes any claims arising from capture, seizure, arrest and so forth by Great Britain or any of her dominions or allies.

In order to get away from two cases which had been decided, as I say, by the Circuit Court of Appeals and by the Supreme Court—the Supreme Court case being the *Llama*—underwriters, and this I expect to show by testimony, underwriters wanted to give the assured coverage from what might happen between the time the vessel was arrested, restrained or detained by the British or her allies and the time she got to a port for examination.

355

I expect to show that that was first given in a rider that applied to cargo and then the underwriters wanted to give shipowners the benefit of being covered during the time from the time of seizure to the time the vessel arrived at a port of search, and that that is what this clause means, and that right in the middle of the clause are the words "But this warranty shall not exclude losses otherwise covered by this policy," and that means losses having to do with the original voyage and the original nature of the vessel and does not cover the arresting power taking the vessel and using her as a warship.

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If the libelant's contention is right on the interpretation of that clause, it would mean that there would be no time limit on what the arresting or restraining government might do to the vessel and there would be no limit on the kind of thing it might do to the vessel as, for instance, sinking the vessel to close a port to the enemy or using it as a shield from enemy vessels.

The Court: Would you make a distinction between the seizure of a vessel or the use of a vessel as an instrument of war, where the sovereign had seized it and undertook to man it with its own crew or to swear in the crew as members of their navy or marine forces, and those instances where a sovereign would step in and direct the operation or the route of the vessel but still leave its operation to its original crew and master?

357

Mr. Mount: You mean where the use of the vessel was the same after the government took it, except in one case where its own crew——

The Court: In one case they took the crew over and they made them part of their organized armed forces, and another case you would have where they directed the operation or route of the vessel, and its destination and its use, but they leave its operation and management undisturbed in civilian hands.

Mr. Mount: I say in either case——

The Court: You would make no distinction?

Mr. Mount: I say in either case that would not be a loss otherwise covered by the policy. It would be a complete change.

The Court: Are there any decisions, Mr. Mount, that you know of on that point?

Mr. Mount: No, this is a new clause. It is an American clause.

The Court: Yes.

Mr. Mount: I requested London to advise me if there were any discussion over there because I couldn't find any over here, and there is no discussion over there.

The Court: It is an American clause.

Mr. Mount: It is an American clause, and I shall have to produce the witnesses in the organizations that drew up the clause and approved it and circulated it and from which Mather got the clause.

The Court: I suppose I will take it to make the record complete but I don't know what weight, if any, I will give that testimony.

Mr. Mount: It shows what the insurance market meant and understood by that clause.

Finally, as to constructive total loss, we argue that the rule of high probability does not apply where there is a formula set out in the policy itself, but even as to the high probability rule, may I just take a few minutes to refer to the situation of the *Portmar* as she lay in Port Darwin?

As she lay aground there, she was in 12 feet of water. Her mean draft was 12 feet 11 inches. The master said she could have remained there for a year without becoming a total loss or deteriorating. She rested on a clay bottom. She never capsized. She was in a sheltered place. Both anchors were down. She had only a 10 or 11 degree list to port when the master last saw her.

The Court: I understand it is the libelant's contention it became highly probable that the ship was a total loss, not so much because of the physical damage, although he does

urge that in part, but he relies in great measure upon the war conditions then prevailing.

Mr. Mount: Yes, but he made no inquiries about what could be done for the vessel. He was on the vessel after she was beached on February 19th, and he was on the vessel, according to his own testimony, seven or eight days after that, and during that time this expert salvor, Captain Williams, was there, salvaging the guns and ammunition. And the master met Captain Williams on February 21st, and the master didn't—the last time the master saw the *Portmar* was on March 4th. So that between those times 362
he saw Captain Williams on his own vessel while he was on his own vessel salvaging the cargo and he knew that he was an expert salvor because he says so in his testimony, but he carefully avoided asking him anything about what could be done to salvage the vessel.

In fact, he said that when he told Williams about that he was going to abandon the vessel, in two places the master said Williams seemed very much surprised. The captain says that the raising of the vessel would be an easy matter if you had the equipment there, but he never asked for the equipment.

It appears that when the master and crew were on 363
their way south, to Melbourne, on March 17th, the chief officer saw two centrifugal pumps on a flat car marked for Captain Williams and going north. It had taken the master and the crew seven days to get to that point. If you allow another seven days for those two pumps to get back to Darwin, they would have been there on March 24th. So that the actual salving of the vessel could not have been started before March 24th and in the judgment in the salvage action in Melbourne, the judgment of the Court pointed out that the pumps were put on board the vessel on April 4th and she was raised on April 5th.

I don't minimize what the master and crew of the *Portmar* went through, but I do say that the claims of the con-

dition of the vessel and their claims about the cost of towage and salvage are very much exaggerated.

There were two salvage claims made against the vessel, one by the government salvage bureau for a hundred thousand pounds, one by Captain Williams for 50,000 pounds, but those were not one claim in addition to the other. The question was, who was entitled to it, and the Court held that the Government Salvage organization was not entitled to it because, although Captain Williams subsequently became head of the Government Salvage organization, he wasn't doing any business for them at that time; he was doing business for himself individually and his private company, and that is why the government salvage claim for a hundred thousand pounds was dismissed by the court, and the salvage claim made by Captain Williams, which is so emphasized by the libelant, was found by the court to be worth 5,000 Australian pounds, just a little over $15,000.

The Court: Do you agree with Mr. Murphy, or is there any issue on whether or not I must determine whether the ship on April 8th was, because of the high probabilities, a total loss or not, that is, that that is the date I must take?

Mr. Mount: April 8th is the date.

The Court: Both agree on that?

Mr. Mount: Yes, we both agree on the April 8th. Situation on April 8th.

The Court: That is the time that I have to pay attention to.

Mr. Mount: That is the time you have to pay attention to, but, of course, your Honor appreciates that we say that not only——

The Court: You say that for several weeks before that it could have been determined——

Mr. Mount: No, no. We say that on April 8th there had not been inquiries made.

The Court: I see.

Mr. Mount: And the courts point out it must be the judgment of an owner, considering that he was on the spot.

Here no inquiry has been made. The high probability rule is not met and, in the second place, the high probability——

The Court: It is not applicable because of the policy provision?

Mr. Mount: Because of the formula in the policy, correct.

Then, the last point which we rely on is that in this decision by Judge Clifford, when he was sitting in Circuit, and a vessel was chartered to the Government and the Government ordered her to cross a bar where there was insufficient water, Justice Clifford held that the Government was, under 368
the charter, the agent of the owner and the underwriters were not liable for that order which had been given by the charterer.

I just refer to that as it seems to me, regardless of anything else in the case, on that decision the underwriters are not liable to the assured.

The Court: Have you any British case that holds the same way?

Mr. Mount: No, I haven't.

The Court: All right.

Mr. Mount: May I add this for your Honor's consideration? The libel is filed against underwriters for $902,000 with nine years' interest. It is not a light responsibility 369
to defend that claim.

The Court: Not a light responsibility to decide it either.

Mr. Mount: No, I agree. Underwriters and we ourselves have felt from the outset that it was so clearly beyond the termination of the insured voyage and beyond our coverage that they have, from the very first, denied liability and instructed us to defend.

And may I add that this is not a case where a solution might be for underwriters to pay and then pursue their subrogated rights. The libelant asks nine years' interest against us and in any suit against the Government there would be either the rule that interest applies only from the time of judgment, if it is in the Court of Claims, or on the

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value of the vessel when the Government requisitioned it, only four per cent from that time.

We feel that your Honor will be convinced that this loss of a vessel that was insured as a commercial vessel and was used as a war ship in an invading expedition was not covered either by the meaning and intent or by the words of the policy. We ask for a dismissal.

Mr. Murphy: And just before your Honor recesses, I would like to make two corrections. The first is, Mr. Mount has asked me to state that—I should qualify my remark that the libel against the United States would be withdrawn
371 if your Honor finds that there is a constructive total loss against the underwriters.

The Court: It won't be withdrawn. It will be dismissed.

Mr. Murphy: Except to this extent, your Honor: Mr. Mount wished me to state that he would insist on his right to maintain that suit as a subrogated underwriter, and I am very glad to make that correction. As far as Calmar is concerned, we are not interested in that suit except in so far as the underwriters may maintain the suit in the name of Calmar after they pay a constructive total loss.

There is one other slight correction I have to make, and then I am through. Mr. Mount called your Honor's atten-
372 tion to the *Williams* case. Your Honor asked if there was any decision in England to the same effect. Mr. Mount said there wasn't any. He is quite right in that. I simply want to call attention to what I think was an inadvertence. Mr. Mount said that in the *Williams* case the ship was under time charter to the United States. She was not. She was under a demise charter because the case says that the United States took the vessel into its possession and control, an absolutely distinguishable fact from the case at bar.

That is all I have to offer, your Honor.

The Court: All right. We will recess until a quarter after two.

(Recess to 2.15 p. m.)

AFTERNOON SESSION.

Mr. Murphy: At the outset, if the Court please, I move for a small amendment of the libel against the underwriters. It appears that on page 6 of that libel our stenographer, in copying out the clauses of the War Risk Policy, copied the rider, which was discussed this morning by Mr. Mount with the Court, at the very top of the page when it should have been at the bottom of the page. I simply want to amend the libel to move that paragraph at the top of the page down to the bottom of the page.

374 The Court: You mean the paragraph beginning, "Notwithstanding anything"——

Mr. Murphy: "else to the contrary contained in this policy, it is understood"——

The Court: And ending "capture, seizure and detention"?

Mr. Murphy: That is right.

The Court: You want to put that down at the bottom, that war risk clause, at the foot of the page?

Mr. Murphy: That is right.

Mr. Mount: No objection.

Your Honor, on that clause, I may have this morning said that we did not claim an ambiguity. What I should 375 say, and I would like to correct it, is that we think the clause is clear but obviously there is an ambiguity in view of the construction which the libelant puts upon it, and it is on that ground that we ask later to introduce evidence to explain the circumstances of the adoption of the clause in the insurance market.

The Court: I have indicated I will take that evidence.

Mr. Mount: Yes. I mean, I don't want——

The Court: But I won't pay any attention to it unless I myself find that it is ambiguous in its terms.

Mr. Mount: That is understood.

The Court: The mere fact that someone else claims another construction doesn't make it ambiguous.

Mr. Mount: That is understood. I simply wanted to clear up any statement I might have made this morning.

The Court: Yes, I understood your position, Mr. Mount.

Mr. Murphy: If the Court please, will it be stipulated that this action against Sydney Keith Scott is an action against all the individual Lloyds Underwriters named on the binder and the Lloyds policy?

Mr. Mount: That is stipulated. That is agreed to.

Mr. Murphy: I now beg leave to refer, for purposes of judicial notice, to certain documents which I will present to the Court and will not offer in evidence but will describe
377 briefly, so that the record will show what they are.

We shall ask the Court to take judicial notice of the historical facts surrounding the outbreak of the war with Japan and the developments thereafter as they affect the facts involved in this case.

The Court: On that aspect, wouldn't it be better for you gentlemen to prepare a schedule of dates and events, somewhat similar to what Mr. Mount has done in his trial brief? For instance, beginning on page 5, he gives me the date of the Japanese attack on Pearl Harbor, the Japanese attack on the Philippines. I don't recall that the dates of the Coral Sea engagement are narrated here.
378 If you feel it very important—nor do I notice that other dates are mentioned—I think that, perhaps, counsel could agree on an historical statement.

Mr. Murphy: We will endeavor to do that.

The Court: If you cannot, then I will have to do my own independent research.

Mr. Murphy: Will your Honor just let me mention these documents——

The Court: Yes.

Mr. Murphy: —and present them to the Court?

The Court: Yes.

Mr. Mount: May I—I beg your pardon—may I offer to all parties now a separate schedule of the *Portmar's* itinerary, if that is of any assistance to you, your Honor. It is practically what is in the brief.

Mr. Murphy: That is not the subject I am on.

The Court: Mr. Murphy wants me to take judicial notice of the historical chain of events.

Mr. Mount: Yes, but you did refer to our itinerary.

The Court: Because in your itinerary you also set forth historical facts which have nothing to do with the itinerary in and of itself.

Mr. Murphy: That is right, your Honor.

First, the 1943 World Almanac, pages 61 to 76 inclusive.

The Court: You are going to give those to me, Mr. Murphy?

380

Mr. Murphy: Yes, I will bring them all up together. I will just describe them now and leave them with your Honor.

Next, the New York Times, November 23, 1941, pages 1, 15 and 19.

Next, the New York Times of November 24, 1941, pages 1 and 6.

Next, a copy of Volume 3 of the History of the United States Naval Operations in World War II, by Samuel Eliot Morison, prepared under the cooperation of the United States Navy Department, Volume 3, entitled, "The Rising Sun in the Pacific," pages 64 to 79 inclusive, on the developments preceding Pearl Harbor, and pages 314 to 321 inclusive in the chapter entitled "The Prelude to the Invasion of Java," which relates many of the events with which the Court is concerned in this case.

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Next, a copy of the New York Times, October 13, 1950, which sets forth instalment No. 4 of Volume IV of the History of the Second World War by Winston Churchill, setting forth quotations and documents and events which are generally concerned in this case.

The Court: You call these to the Court's attention simply as a means that the Court may take of refreshing its recollection as to historical facts of which I should take judicial notice?

Mr. Murphy: Exactly, your Honor.

The Court: I will be glad to have other matters counsel for the underwriters or the Government desire to call to my attention. I will be glad to receive them because I am only going to take judicial notice of historical facts concerning which there is no dispute or issue.

Mr. Murphy: I would call Mr. Littleton Groom.

LITTLETON GROOM, called as a witness on behalf of the
383 libelant, being duly sworn, testified as follows:

Direct examination by Mr. Murphy:

Q. Where do you live, Mr. Groom? A. Princeton, New Jersey.

Q. Are you a member of the Bar? A. I am.

Q. Are you associated with the Calmar Steamship Corporation? A. I am.

Q. In what capacity? A. Vice-President.

Q. Were you employed by Calmar Steamship Corporation during the year 1942? A. I was.

Q. What was your position then? A. House counsel.

Q. Were you in a position close to the president of the
384 corporation at that time? A. Very close.

Q. How would you describe your relationship with the president of Calmar Steamship Corporation at that time? A. We had conferences frequently throughout the day; he would confer with me and I would confer with him on various matters in which Calmar Steamship Corporation was interested.

Q. Has Calmar Steamship Corporation an office and place of business within the City of New York? A. It has.

Q. Where? A. 25 Broadway.

Q. Who was the owner of the *Portmar* during the period beginning November 21, 1941, and ending November 17, 1942? A. Calmar Steamship Corporation.

Q. Have you in your files a statement of the particulars, dimensions and characteristics of the Steamship *Portmar*? A. I have. These are sister ships (indicating).

Q. You have handed me a paper on which certain particulars are shown with respect to four vessels, among them the *Portmar*. Does this column headed "*Portmar*" set forth your office record of the particulars of the *Portmar*? A. It does.

Mr. Murphy: It will shorten the testimony considerably if I may offer this in evidence as a summary of Mr. Groom's testimony. 386

Mr. Mount: No objection.

The Court: We are not concerned with the sister ships.

Mr. Murphy: No, sir. Only as a summary of Mr. Groom's testimony on the particulars of the *Portmar*.

The Court: The particulars are accepted in evidence as the witness' testimony but substitute, Mr. Murphy, just a statement of the ship involved in this suit so that we won't be confused with other data.

Mr. Murphy: That is right.

The Court: Do that sometime during the trial.

(Marked Libelant's Exhibit 1.) 387

Mr. Murphy: Off the record.

(Discussion off the record.)

Q. With what classification society was the *Portmar* classed? A. Lloyds.

Q. What was her classification? A. A-1.

The Court: Mr. Murphy, on this Exhibit No. 1 you have estimated cost of reproduction, date of estimate, January 19, 1944. Am I to disregard that date?

Mr. Murphy: Yes, your Honor. That does not bear on this case.

The Court: Let us have this typewritten then so as to include only the statistical data on the *Portmar*, leaving off the balance of it there, the estimated cost of reproduction, cost per ton, deadweight tons.

Mr. Murphy: Yes, your Honor.

Mr. Mount: Just the physical facts.

Mr. Murphy: That is right.

The Court: Mr. Murphy will have this typewritten.

Mr. Murphy: That's right.

389 Q. What was the speed of the *Portmar* on a consumption of fuel oil per day of 164 barrels? A. In excess of 9½ knots.

Q. Have you any certificate in your file bearing on the speed of the *Portmar*? A. We have.

Q. Will you produce it, please? A. (Hands paper to Mr. Murphy.)

Q. Will you tell the Court what that certificate is? A. This is a certificate that was issued by the American Bureau of Shipping at the request of War Shipping Administration, setting forth the speed of the *Portmar* computed on a formula devised by the War Shipping Administration, and
390 known as General Order 10, Supplement No. 2. Shows a speed of 10½ knots.

Q. Is that certificate dated April 25, 1944? A. It is.

Mr. Murphy: I offer that certificate in evidence.

(Marked Libelant's Exhibit 2.)

The Court: Is it conceded by all parties that this certificate represents the estimated speed of the vessel at the time involved in this suit here, in 1941?

Mr. Smith: It is not, your Honor. That is a formula computation for certain purposes of the War Shipping Administration, and I don't believe it necessarily reflects the actual speed of the vessel.

The Court: What weight can I give this, Mr. Murphy? The certificate is dated three years after the event complained of.

Mr. Murphy: It is a computation made by the Government as to the speed of the vessel, the *Portmar*, and the vessel doesn't change her speed.

The Court: I don't know whether it changed or not. According to the openings she underwent extensive repairs and alterations.

Mr. Murphy: This does not bear on the *Portmar* in her condition after the bombing. This is simply 392
a certificate of the speed of the *Portmar* as she was constructed and operated by the Calmar Steamship Corporation, and for purposes—may I ask?

Q. What was the purpose of this certificate? A. It was for two purposes, for calculation of charter hire under a later form of time charter, and for calculation of valuation for insurance purposes in the event she was insured by the Government, under those later time charters.

Q. At this time, of course, 1944, the *Portmar* was no longer in your possession; she had been requisitioned? A. That is right.

Q. This was a computation made for adjustment of 393
certain charter hires with respect to charters preceding the damage of the *Portmar* in this case? A. No, succeeding the damage of the *Portmar*.

Q. Was it made for the purpose of figuring and computing charter hire with respect to the *Portmar* during the period February 19 to November 17, 1942? A. Mr. Murphy, the War Shipping Administration was changing its mind and its orders so frequently, and making retroactive orders with respect to charter hire, that we had this certificate furnished by the American Bureau and then we furnished it to the War Shipping Administration. They never used it for the purpose of our charter hire or valuation.

394 Q. You had it prepared for retroactive purposes? A. In the event that the War Shipping Administration attempted to apply its retroactive orders to the *Portmar*.

Mr. Murphy: On that basis, then, I think——

The Court: There is no objection to it, so it has been received in evidence.

Q. In November 1941 was any charter made with the Maritime Commission was respect to the *Portmar*? A. Yes, sir.

395 Q. I show you a document and ask you what that is? A. That is a copy of a time charter, dated as of November 21, 1941, between Calmar Steamship Corporation, owner of the S.S. *Portmar*, and the United States Maritime Commission, covering the use of the *Portmar*—use of the space in the *Portmar* by the Government. It bore the Government contract number MCC1915.

Mr. Murphy: I offer the document in evidence.

If the Court please, this document was offered in evidence in connection with the master's testimony on July 31, 1945. It is marked Exhibit 1 for identification.

396 The Court: We will leave that alone. We will leave that notation on there.

Mr. Murphy: Is that the Court's pleasure, to leave that on there?

The Court: Leave that on there, and then we will put a new number on it.

(Marked Libelant's Exhibit 3.)

The Court: Leave the old notation on so we may relate it to the master's deposition.

Mr. Mount: Your Honor, of course, will note the charter party, not the characterization of it by the witness.

The Court: The witness is a lawyer, and I used to be a lawyer before I became a Judge.

Q. So far as you know, did Calmar Steamship Company perform each and all of the conditions on the part of Calmar to be performed under that charter?

Mr. Smith: I object to the question as calling for a conclusion.

The Court: It does call for a conclusion but it might save an awful lot of testimony——

Mr. Murphy: That is the idea.

The Court: —if you will let him answer, and then you may cross examine him.

Mr. Murphy: That is right. 398

Mr. Smith: It is a conclusion of one of the principal issues in the case between the charterer and the libelant.

The Court: Objection? Then it is sustained.

Mr. Murphy: I call the Court's attention—I will ask another question.

Q. I am asking you now, Mr. Groom, whether within your own knowledge, so far as you know, you know of any particular in which Calmar Steamship Corporation did not perform any condition on its part to be performed under that charter? A. I do not know of any. 399

Q. Who was the master of the *Portmar* during the period beginning November 21, 1941, and ending November 17, 1942? A. Captain Axel Michelson.

Q. How long had Captain Michelson been in the employ of Calmar Steamship Corporation prior to that time? A. Since 1927.

Q. Did the management of Calmar Steamship Corporation regard Captain Michelson as a competent shipmaster? A. A very competent shipmaster, Mr. Murphy. We wish we had more like him.

Q. At the beginning of this voyage, Mr. Groom, did Calmar Steamship Corporation take out war risk insurance on the hull of the *Portmar* for the proposed voyage pur-

400 suant to the provision of Article 2.17 of the charter, Libelant's Exhibit 3? A. May I look at it?

The Court: Do you have to look at it?

The Witness: I am confused whether it is 2.04 or 2.17.

(Exhibit handed to witness.)

A. (Continuing) It did.

Q. I show you what purports to be a slip or binder, issued on the heading of Thomas Stephens & Sons, Ltd.

401 Mr. Murphy: It has been stipulated, if the Court please, that this document is admissible in evidence.

Q. (Continuing) Will you look at that paper and tell us what it is?

The Court: Have all these papers that you are now showing the witness been stipulated to be introduced in evidence later?

Mr. Murphy: Yes.

The Court: Why don't you offer it in evidence now and get that over with? That might save time.

Mr. Murphy: At the Court's suggestion, I withdraw that, and I offer the following: I offer in evi-

402 dence stipulation between proctors for libelant and proctors for respondents, the underwriters, in action A. 133-332, describing certain documents annexed thereto. I offer the entire stipulation with the documents annexed thereto as one exhibit.

The Court: Do you want me to take this against the Government too?

Mr. Smith: I have no objection.

The Court: Received in evidence.

(Marked Libelant's Exhibit 4.)

The Court: And you may have photostats made for me.

Are those the original papers, Mr. Murphy?

Mr. Murphy: They are photostats, if the Court please. The originals——

The Court: You are going to give me a copy of this exhibit?

Mr. Murphy: Yes, sir.

The Court: All right.

Mr. Murphy: We will give your Honor the original. We will give your Honor this exhibit.

While we are on this subject, if the Court please, I also offer a further stipulation made between proctors for libelant and proctors for the respondent 404
underwriters in A. 133-332, this stipulation having annexed to it certain documents not recited in the stipulation, and which I will identify now: Photostat of letter from Thomas Stephens & Sons, Ltd. to Messrs. Mather & Company of Philadelphia, dated February 6, 1942.

Next, photostat of cable sent by Mather, Ltd. to Thomas Stephens & Sons of London, dated April 7, 1942.

Next, photostat of cable sent by Thomas Stephens & Sons, Ltd. to Messrs. Mather of Philadelphia, dated April 8, 1942.

Next, photostat of cable sent by Thomas Stephens 405
& Sons, Ltd. to Messrs. Mather of Philadelphia, dated April 9, 1942.

Next, certified copy of the judgment of the High Court of Australia in Admiralty between United Salvage Proprietary, Ltd. and John Protheroe Williams, plaintiffs, and the Ship *Portmar*, defendant.

Mr. Mount: Do you want to add, for the sum of 5000 pounds?

Mr. Murphy: Yes, for the sum of 5000 pounds and costs, dated November 19, 1943, with certified copy of satisfaction of that judgment signed by one Francis Gregory Murphy at Melbourne, March 24,

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1950. It is stated that Mr. Murphy was managing law clerk in the employ of the solicitors for the plaintiffs in the salvage suit, acknowledging satisfaction of the judgment. Both documents certified and authenticated.

Mr. Mount: In the sum of—put that in.

Mr. Murphy: Satisfaction?

Mr. Mount: Satisfaction.

Mr. Murphy: In the total sum of 6,156 pounds, 9 shillings 9 pence, being made up of salvage judgment of 5,000 pounds, costs taxed 1,156 pounds 9 shillings and 9 pence, less 500 pounds already paid into court by solicitors for the *Portmar*.

407

The Court: Does the Government consent that this be received in evidence?

Mr. Smith: No objection.

Mr. Mount: No objection.

(Marked Libelant's Exhibit 5.)

Q. I show you three documents and ask you what they are. A. Those are the policies of war risk insurance issued by the underwriters to cover the SS. *Portmar*.

408 Q. On the voyage—— A. On the voyage to the Philippines and return to North Atlantic port.

Mr. Murphy: I offer the original policies in evidence, the first being Lloyds policy as Libelant's Exhibit 6.

(Marked Libelant's Exhibit 6.)

Mr. Murphy: The next policy is the policy of the Institute of London Underwriters.

(Marked Libelant's Exhibit 7.)

Mr. Murphy: And the next is the policy of Excess Insurance Company, Ltd.

(Marked Libelant's Exhibit 8.)

The Court: You substitute photostats. I don't like to have original papers left with me.

Mr. Murphy: Does the Court wish us to send these photostats right away or when we submit?

The Court: When you submit your briefs. Do it whenever it is convenient to yourselves, but at least have them in when you submit your briefs. I don't like to keep too many original papers.

Mr. Mount: Would it aid the Court if we stipulated that the three policies are in the same terms and conditions, merely different underwriters? 410

The Court: They are identical in form and differ in substance only as to the underwriters and the amounts?

Mr. Murphy: Right.

The Court: So then send me up one—better send the three up.

Mr. Mount: You need only look at one.

The Court: No, we will use the three of them.

Mr. Murphy: If the Court please, I have to put in a couple of other policies which do not relate to Mr. Mount's client—perhaps one does—but which——

411

Mr. Mount: No, I don't see why those are relevant in this case.

The Court: Let me hear what he wants to say first, Mr. Mount, and I may agree with you. What policies do you want to put in?

Mr. Murphy: These are the other policies taken out pursuant to clause 2.17 of its charter.

The Court: What is that, marine risks?

Mr. Murphy: No, war risk protection and indemnity, covering the repatriation expenses of the crew, the insurance on their lives for death and bodily injury, the insurance on the slop chest, and the insurance of——

412 Mr. Mount: Personal effects.

Mr. Murphy: On the claim against the United States, that is to say, if the events——

The Court: You mean they would be included in the charter hire?

Mr. Murphy: No.

Mr. Smith: We say the premium payable under them is deductible from the charter hire. We think they are relevant.

The Court: Why put the policies in? Why don't you just stipulate as to the nature of the policy
413 and as to the amount? Wouldn't that be simpler?

Mr. Murphy: It would be a good suggestion, if the Court please, but it might be quicker to have them marked.

The Court: Quicker for you, but it will be more difficult for me. If I have a tabulated schedule that this insurance cost so much; and that insurance cost so much, and you introduce it all set forth on a schedule, I won't have to go rummaging through five or six policies if and when the time comes. Prepare a schedule showing the nature of the insurance, the date it was issued, and the amount of premium. Put
414 it all on one schedule.

Mr. Smith: And the amount paid under the policies.

Mr. Mount: With the statement that they are relevant only as between Calmar and the Government.

The Court: They have nothing to do with the case.

Mr. Murphy: They have nothing to do with your clients. They have nothing to do with the respondents in this suit.

Mr. Mount: Right.

The Court: We understand.

By Mr. Murphy:

Q. After the insurance was arranged, Mr. Groom, did Calmar Steamship Corporation inform the United States Maritime Commission of the nature and terms of the insurance which had been taken out? A. It did.

Q. I show you a photostat of a letter and ask you what that is. A. That is a letter dated November 26, 1941, from Calmar Steamship Corporation, signed by Mr. H. W. Warley, addressed to Mr. B. K. Ogden, Director, Division of Insurance, U. S. Maritime Commission, describing the insurance placed, the amounts, the companies with which placed 416
—underwriters—the coverage and the premium.

Mr. Murphy: I offer that letter in evidence.

The Witness: When I said coverage, I meant amount of coverage, amount of insurance.

Mr. Mount: May I ask one question about this?

Mr. Murphy: Go right ahead.

Preliminary cross examination by Mr. Mount:

Q. Mr. Groom, I noticed in the first paragraph of this letter it refers to the various forms of war risk insurance for charterer's account. By that did you mean for the 417
financial account of the charterer, that is, at his expense? A. That is right, the premium——

Mr. Smith: I object to that question, if your Honor please. I don't think this witness can interpret the letter.

The Court: Yes, the letter will have to speak for itself.

Mr. Smith: He didn't write it.

The Court: The objection is sustained. In fact, this witness's description of the contents of a letter should not be in evidence at all. Simply offer the letter in evidence. I can read it.

418 Mr. Murphy: I offer in evidence photostat of a letter from Calmar Steamship Corporation, signed by H. W. Warley, President, to B. K. Ogden, Director, Division of Insurance, United States Maritime Commission, Washington, D. C., dated November 26, 1941, entitled "SS. *Portmar*, Voyage 398."

(Marked Libelant's Exhibit 9.)

The Court: Give Mr. Mount a copy and Mr. Smith a copy.

419 *Direct examination resumed by Mr. Murphy:*

Q. Mr. Groom, did the Maritime Commission subsequently write to Calmar Steamship Corporation with respect to the insurance described in the letter which has just been offered in evidence and marked Libelant's Exhibit 9? A. It did.

Q. Have you the letter from the Maritime Commission? A. (Hands paper to Mr. Murphy.)

Mr. Murphy: I offer in evidence letter from the United States Maritime Commission to Calmar Steamship Corporation, dated February 20, 1942, referring to the *Portmar*, as Libelant's Exhibit 10.

420

(Marked Libelant's Exhibit 10.)

Q. I show you a document and ask you what that is. A. Photostatic copy of the Shipping Articles, covering the voyage of the *Portmar*.

Mr. Murphy: I offer that in evidence as bearing on the rates of wages and as relating to the expenditures made by Calmar with respect to wages of the crew during repatriation and kindred matters.

The Court: This concerns your possible claim against the Government?

Mr. Murphy: Yes, your Honor. This does not relate to the action——

The Court: Does not relate to the underwriters at all?

Mr. Murphy: That is right, your Honor.

(Marked Libelant's Exhibit 11.)

Q. Mr. Groom, when did the *Portmar* sail on the voyage provided in the charter? A. November 28, 1941.

Q. From what port? A. Port of San Francisco.

Q. Did you receive any word from the vessel of any 422 kind or concerning the vessel prior to the Japanese attack on Pearl Harbor? A. We did not.

Q. After the attack on Pearl Harbor did you receive——

The Court: Suppose you refer to dates, Mr. Murphy, rather than to events.

Mr. Murphy: All right.

Q. When I refer to the attack on Pearl Harbor, I meant on December 7, 1941. A. We did not.

Q. After December 7, 1941, did you receive any word from the vessel immediately? A. No, sir.

Q. Did you make any effort to trace the vessel and ascer- 423 tain what she was doing and where she was? A. Yes, sir, we did.

Q. What did you do? A. We had Mr. Usher, our vice-president in San Francisco, inquire of the Navy. He wrote us back on or about December 31 that the Navy had no information. We inquired of the Navy Department in Washington, near the end of December, and were told that the vessel was safely afloat.

Q. When did you first learn that the *Portmar* did not go to the Philippine Islands? A. Officially or unofficially, Mr. Murphy?

Q. In any way. A. We learned unofficially somewhere near the middle of January. I believe it was the 17th or

19th of January. On the 17th of January one of our employees at the office called Mr. Hunter of Lavino & Company, who supplied Bethlehem with a large amount of ore with respect——

Q. Just stop there a minute. Let me interrupt you a minute. You mentioned the name of Bethlehem. Do you mean by that Bethlehem Steel Corporation? A. Bethlehem Steel Company.

Q. Will you tell the Court what the relationship between Calmar Steamship Corporation and Bethlehem Steel Company is? A. Bethlehem Steel Company and Calmar Steamship Corporation are 100 per cent subsidiaries—the capital stock is 100 per cent owned by Bethlehem Steel Corporation. So Bethlehem Steel Company and Calmar Steamship Company are affiliates.

425

Q. When you said that Lavino supplied ore to Bethlehem Steel Company, you mean ore for use in the activities of the steel business? A. Right.

Q. Go ahead then. Carry on from there. A. He inquired of Mr. Hunter respecting a cargo of ore that Bethlehem was expecting. Our office handled the ocean transportation of all such cargoes. And in the course of the conversation Mr. Hunter told him that the SS. *Portmar* was going to load a cargo of chrome ore at New Caledonia for Lavino for discharge at Philadelphia; that the vessel would be under the agency of Vic Freeze.

426

Q. Who is Mr. Freeze—F-r-e-e-z-e, is that right? A. That is correct.

Q. Who is he? A. At that time he was traffic manager of United States Lines. He is now vice-president of United States Lines. We were unable——

Q. Mr. Freeze of U. S. Lines was to be the homeward agent for the Maritime Commission on this charter, is that correct? A. That is correct. And that day, that was Saturday, we could not get hold of Mr. Freeze, so we got hold of him on Monday and then for the first time we

learned that the vessel was in Australia. He said that the vessel was in Australia, he didn't know what port, and confirmed what Mr. Hunter had told us, that she was to load a cargo of chrome the latter part of February for discharge at Philadelphia about the middle of April.

Q. Did I understand you to say that Mr. Freeze said that the *Portmar* was in Australia somewhere? A. That is correct.

Q. Is that the first information you had of where the vessel was at that time? A. That is correct, and that was unofficial. 428

Q. Did you receive any other information as to the movements of the *Portmar*? A. Then a couple of days later we received a teletype from Mr. Usher, of our San Francisco office, which stated that "Michelson, Darwin, January 19."

Q. Will you interpret that for us? A. Michelson is the captain of the *Portmar*, and he meant that the SS. *Portmar* was at Port Darwin, Australia, on January 19th.

Q. Was it usual in those days to identify vessels just by the names of masters? A. Oh, yes.

Q. On receipt of that teletype message from your San Francisco office what did you do? A. That teletype was received late on the 22nd of January. On the 23rd we 429 considered it at a conference in our office, and conferred with our attorneys, and decided that while it probably wasn't necessary, it wouldn't be—it might be advisable to send a cable to the underwriters.

Q. I show you a cable attached to the stipulation Libelant's Exhibit No. 4 and ask you if that is the cable which you requested Mather to send? A. Yes, we acted through our brokers, Mather & Company.

Q. I meant to ask you that. Who were your brokers in arranging this insurance? A. Mather & Company.

Q. Of Walnut Street, Philadelphia? A. Yes.

430 Q. Did you request Mather to send that message? A. We did.

Q. The name of Thomas Stephens & Sons, Ltd. appears in the papers quite frequently here. Who were they? A. They were Mather & Company's correspondents in London.

Mr. Murphy: I ask the Court at this point to note that this cable bears many initials, it is the cable received by Stephens from Mather, and I don't think it will be disputed that those are the initials of the several underwriters interested in this claim.

431 Mr. Mount: We agree to that.

The Court: It is not disputed?

Mr. Mount: Not disputed.

The Court: That this cable came to the attention of the underwriters?

Mr. Mount: Shown to the underwriters and initialed by them.

Q. Did Messrs. Mather subsequently report to you that that cable of January 24th had been submitted to the underwriters and had been agreed to?

Mr. Mount: I object to the form of that question.

432 Let the letter from Stephens speak for itself.

The Court: Objection sustained.

Mr. Murphy: Very well. I will withdraw the question altogether. The exhibit will speak for itself.

Q. Mr. Groom, when did Calmar Steamship Corporation first learn that the *Portmar* did not go to the Philippine Islands as provided in the charter by reason of government orders? A. May 1 or 2, 1942.

Q. I show you a cable, which has already been marked Libelant's Exhibit 15 for identification, and ask you if that cable was received by your office? A. It was.

Q. Does it refresh your recollection? A. Well, this tells us, Mr. Murphy——

The Court: No, does it refresh your recollection? Yes or no.

The Witness: Not on the question asked, no, sir.

Q. Then I will ask this question: When did you first know that the *Portmar* had been diverted to Suva in the Fijis? A. April 1st, 1942.

Q. Is that the cable which gave you that information (indicating)? A. That is the cable. 434

Mr. Murphy: I offer the cable in evidence, cable from Captain Axel Michelson to Calmar Steamship Corporation, dated Melbourne, April 1, 1942.

(Marked Libelant's Exhibit 12.)

(Short recess.)

By Mr. Murphy:

Q. Mr. Groom, in your cable of January 24, 1942, which is contained in Libelant's Exhibit 4, in the cable which you requested Mather to send, which was sent to Stephens on January 24, 1942, the words appear, "*Portmar* diverted to Australia on outward voyage on Government orders." 435 What information did you have at that time about Government orders? A. We didn't have any, Mr. Murphy. We knew our captain; we knew that he would not have gone to Australia except for Government orders.

Q. Did Calmar Steamship Corporation ever receive two letters written by Captain Michelson and sent by him from Suva, Fijis, on or about December 20, 1941? A. No, sir.

Q. What was the first official notice that Calmar Steamship Corporation had respecting the movements of the *Portmar* after Pearl Harbor, after December 7, 1941? A. That was a letter dated February 18, 1942, which we

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received on February 19, 1942, from the Maritime Commission.

Q. Have you that letter in your file? A. No, sir, one of our files is lost or missing and the letter was in that file.

Q. Do you remember what was in that letter? A. I remember that the letter stated that the *Portmar* arrived Darwin February 12th.

Mr. Murphy: Has Government counsel a copy of that letter, by any chance?

Mr. Smith: We haven't.

437

Q. Did you receive any further word as to the movements of the *Portmar* after that letter from the Maritime Commission which you received on or about February 19, 1942? A. We received a telegram from Mr. I. M. Holt of the Maritime Commission on or about February 24th.

Q. Is that the telegram you received (indicating)? A. It is.

Mr. Murphy: I offer it in evidence. This is a telegram from I. M. Holt, War Shipping Administration, to Calmar Steamship Corporation, dated Washington, February 23, 1942.

438

(Marked Libelant's Exhibit 13.)

Q. What is the first word you received from the master of the *Portmar* concerning the movements of the vessel after Pearl Harbor, December 7, 1941? A. We received two telegrams, Mr. Murphy. As I recall, one was dated March 23 and one was dated March 24, both from Melbourne, one with respect to the crew and one with respect to the vessel.

Q. I show you one cable dated March 24 from Captain Michelson to your company. Is that one of those telegrams? A. That is.

Q. I show you another one, dated March 30. Is that the other one or have you another one in mind? A. I have another one in mind.

439

Mr. Murphy: I offer the cable of March 24 in evidence.

Mr. Smith: No objection.

(Marked Libelant's Exhibit 14.)

Q. I show you cable dated April 6, 1942, and ask if that is the other cable you had in mind? A. No, sir.

Mr. Murphy: I offer this cable dated March 23, 1942, in evidence.

Mr. Smith: No objection.

440

(Marked Libelant's Exhibit 15.)

Q. Did you send an answer to Captain Michelson's cable of March 24th? A. We did.

Q. Is that the answer you sent (indicating)? A. It is.

Mr. Murphy: I offer it in evidence.

These have all been seen a dozen times by all counsel.

The Court: They like to look at them again, perhaps to refresh their recollection. Maybe they think they are favorable to them.

Mr. Smith: No objection.

441

(Marked Libelant's Exhibit 16.)

Q. I show you cable from Malleson, Stewart & Company, solicitors, Melbourne, to Calmar-Bethlehem Steel Corporation, dated March 30, and ask you if you received that cable? A. We did.

Mr. Murphy: I offer it in evidence.

Mr. Smith: No objection.

(Marked Libelant's Exhibit 17.)

Q. I show you letter from the United States Maritime Commission to Mr. H. W. Warley, President, this letter

being signed by J. E. Outler, Chief, Ship Control Section, dated April 3, 1942, and ask you if you received that letter? A. Yes, we did.

Mr. Murphy: I offer it in evidence.
Mr. Smith: No objection.

(Marked Libelant's Exhibit 18.)

Q. After receipt of these communications, Mr. Groom, did Calmar Steamship Corporation take any action with respect to the war risk underwriters on the *Portmar*?
443 A. Yes, sir.

Q. What did you do? A. Through Mather & Company we tendered abandonment of the *Portmar* as a constructive total loss.

Q. I show you a cablegram of April 7, 1942, from Mather, Co. to Thomas Stephens & Sons, London, annexed to stipulation, Libelant's Exhibit 5, and ask you if that cable was sent at your request? A. Yes, sir.

Q. I show you the next cable from Stephens to Mather, dated April 8, 1942, and ask if Mather reported receipt of that cable to you? A. Yes, sir.

Q. And now the next document attached to the stipula-
444 tion, Libelant's Exhibit 5, is a photostat of a cable from Thomas Stephens to Mather, dated April 9, 1942. Did Mather report receipt of that cable to you? A. Yes, sir.

Q. Did you inform Malleson, Stewart & Company, Melbourne, as to the action you were taking with respect to the *Portmar* and the Underwriters? A. Yes, sir.

Q. Is this the cable you sent to Malleson, Stewart, dated April 7, 1942? A. Yes, sir.

Mr. Murphy: I offer the cable in evidence.
Mr. Smith: No objection.

(Marked Libelant's Exhibit 19.)

Q. I show you photostat of letter dated April 8, 1942, from Thomas Stephens & Sons, Ltd. to the companies on

combined policy No. D41/11,356, and another letter from Thomas Stephens & Sons, Ltd. to underwriters on policy No. D41/11,356 at Lloyds, these letters bearing certain initials and notations attached, all being attached to the stipulation, Libelant's Exhibit 4.

Did the Calmar Steamship Corporation subsequently receive those copies of those letters from Mather & Company? A. Yes, sir.

Mr. Murphy: Here again, Mr. Mount, I take it that it is stipulated that the notations and initials on these letters are those of the underwriters named on 446 the policies?

Mr. Mount: I agree those are the initials of the underwriters.

Q. There is also attached to the stipulation Libelant's Exhibit 4 a photostat of a letter from the Excess Insurance Company, Ltd. to Thomas Stephens & Sons, Ltd., dated April 9, 1942. Did Calmar Steamship Corporation subsequently receive a copy of that letter from Mather & Company? A. Yes, we did.

Q. Did Calmar Steamship Corporation later receive a copy of a communication from Thomas Stephens & Sons to Mather, Ltd. in January 1943? A. Yes, sir. 447

Q. I show you photostat copy of a letter dated January 8, 1943, from Thomas Stephens & Sons, Ltd. to Messrs. Mather & Company, Philadelphia, annexed to stipulation Libelant's Exhibit 4. Is that the photostat of the letter to which you referred? A. Yes, it is.

Mr. Murphy: If the Court please, I have here a group of cables exchanged between Calmar Steamship Corporation and the master of the *Portmar* in Melbourne, beginning with April 6, 1942, and ending March 3, 1943. They have all been offered in connection with the testimony of Captain Michelson, and it will save time if we can put them in.

448 *Littleton Groom, for Libelant—Direct.*

The Court: If it is conceded that these are original cables exchanged between the captain and the steamship owners, mark it as one exhibit.

Mr. Mount: If Mr. Murphy tells us so, that is good enough.

The Court: Mark them as one exhibit.

Mr. Murphy: I think they are familiar to all counsel.

(19 cables and one handwritten letter marked Libelant's Exhibit 20.)

449

Q. Was Calmar Steamship Corporation informed during the summer of 1942 that The Commonwealth Salvage Board had made a claim for salvage award against the *Portmar* in the sum of 100,000 pounds? A. Yes, sir.

Q. And were you also informed that United Salvage Proprietary, Ltd. and John Protheroe Williams had asserted a claim of 50,000 pounds Australian? A. We were.

Q. I show you a letter from the War Shipping Administration to Calmar Steamship Corporation, dated October 24, 1942. Did you receive that letter? A. We did.

Mr. Murphy: I offer it in evidence.

450 Mr. Mount: I have no objection. Will you let me have a copy of that particular one?

Mr. Murphy: Surely. I thought you already had one.

Mr. Mount: No, I haven't.

Mr. Smith: No objection.

Mr. Murphy: I offer it in evidence.

(Marked Libelant's Exhibit 21.)

Q. I show you a telegram from W. C. Peet, Jr., Secretary of the United States Maritime Commission, to Calmar Steamship Corporation, dated November 12, 1942, and ask you if your company received that telegram? A. Yes, we received it.

Mr. Murphy: I ask that that telegram be marked in evidence.

(Marked Libelant's Exhibit 22.)

Mr. Murphy: If the Court please, I have here what purports to be the original requisition certificate of the *Portmar*, dated Brisbane, Queensland, Australia, November 17, 1942, and ask if it is stipulated that the copy of it which is attached to Libelant's Exhibit 22 may be marked in evidence in lieu of the original requisition certificate? 452

Mr. Mount: Yes.

Mr. Smith: Yes.

Mr. Murphy: I offer in evidence the copy attached to Libelant's Exhibit 22 as Libelant's Exhibit 23.

(Marked Libelant's Exhibit 23.)

Mr. Mount: All one exhibit?

Mr. Murphy: No.

The Court: The requisition is 23.

Q. Mr. Groom, referring to the first cause of action of the libel of Calmar Steamship Corporation against the United States, in which the libelant claims charter hire with respect to the *Portmar* for the period February 18, 1942, to noon November 17, 1942, Eastern Australian Time, have you computed the amount of charter hire which Calmar Steamship Corporation contends that it is entitled to recover from the United States? A. Yes, sir. 453

Q. Will you state the claim? A. Charter hire, $360,026.71, in addition to feeding of——

The Court: Wait a minute. That is from what date to what date?

The Witness: February 20, 1942 to November 17, 1942.

The Court: Why do you pick out February——

454 *Littleton Groom, for Libelant—Direct.*

The Witness: February 19. That was the date the vessel was damaged in Port Darwin.

The Court: And what is the terminal date?

The Witness: November 17, the date she was requisitioned.

Mr. Murphy: The date requisitioned for title.

The Court: Have you been paid any part of that charter hire?

The Witness: We were paid, your Honor, for the balance of the month of February, and then it was
455 taken back from us on charter hire that was owed on another ship.

The Court: An adjustment?

The Witness: An adjustment.

The Court: So that you haven't been paid for that period of time?

The Witness: That is right.

The Court: The Government disputes your claim. Have you billed for that?

The Witness: No, sir.

Mr. Murphy: We have sued for it.

The Court: You have sued for it? You have made
456 demand?

Mr. Murphy: We have made demand.

Q. There is one other item. What is that item? A. Feeding of three passengers, three supercargoes, from November 28, 1941 to January 19, 1942. Amounts to $238.50, making a total claim of $360,265.21.

Mr. Murphy: I have here, if the Court please, a computation of the charter claim with the adjustment document attached to it which, in order to illustrate the testimony, may be offered simply so that there will be a written record of how it is figured.

The Court: Show it to Mr. Smith.

Mr. Smith: I don't concede its relevancy but I have no objection to its being in for the purpose of the Court's convenience.

The Court: It is simply a graphic——

Mr. Murphy: That is all.

The Court: —representation of the claims made.

Mr. Murphy: That is right.

The Court: It may be convenient for me to look at this instead of digging through the testimony.

(Marked Libelant's Exhibit 24.)

458

Q. As to the expenses, did Calmar Steamship Corporation incur any expenses as a result of the damage sustained by the *Portmar*? A. Yes, sir.

Q. Will you describe what they were? A. It incurred expenses in respect of salvage, in respect of repatriation of the crew and in respect of sue and labor.

Q. Take up the salvage first.

The Court: Have you a list of those expenses?

Mr. Murphy: Yes, sir, it is all written down.

The Court: Did you pay out that money?

The Witness: We did.

The Court: You feel they were just and reasonable expenses necessarily incurred? 459

The Witness: Yes, sir.

The Court: Any objection to receiving the statement in lieu of his testimony?

Mr. Smith: No.

Mr. Mount: No objection to the statement. I would like to look over the items.

The Court: Yes. I mean, you are not conceding they are legitimate charges but you are simply conceding that libelant would offer testimony as to the reasonableness of these disbursements and as to the fact that they were made.

460

Mr. Mount: If Mr. Groom says they were made, that is sufficient for us.

(Marked Libelant's Exhibit 25.)

Q. Mr. Groom, looking at this schedule, it comes to a total sum of $27,322.35. Am I right in that? A. No, sir.

Q. Oh, yes, tell me— A. $63,000.

Q. $63,764.26, and I think you said that is made up of salvage, sue and labor, and repatriation. Will you break that down for us and tell us how much is attributable to salvage, and the legal expenses attached to that, and how much is sue and labor, and how much is repatriation of the crew? A. To salvage and legal expenses in connection with it, $20,008.59.

461

Q. That is salvage award and costs? A. Right.

Q. No legal fees in that? A. No, that is right.

Q. Now, next, what about the legal fees in the defense of the salvage action? A. Legal fees and disbursements, $7,313.76.

Q. Are those the total legal fees paid to Malleson, Stewart, including the defense of the salvage action? A. Right.

Q. What other sue and labor items have you? A. We have the masters' wages, his expenses, the subsistence, cablegrams, and we have a survey fee.

462

The Court: They are all itemized here?

Mr. Murphy: Yes.

Q. Just let us have the total of the sue and labor expenses, outside of the salvage you have just given us. A. Including the $7,313 figure I have just given you, the total is $17,940.34.

Q. What is the total of the expenses incurred in the repatriation of the master and the crew? A. $17,835.96.

The Court: We will adjourn now until 10.15 tomorrow morning.

(Adjourned to January 19, 1951, at 10.15 a. m.)

New York, January 19, 1951;
10:15 a. m.

TRIAL RESUMED.

LITTLETON GROOM, resumed the stand.

Mr. Murphy: While we are waiting for Mr. Mount, if the Court please, there is one formality that I might accomplish. I think Mr. Hall can represent Mr. Mount just for the purpose of my substituting a rewrite of Exhibit 1 pursuant to the direction of the Court. 464

The Court: Yes, that was statistical information concerning the ship? Yes, all right.

Direct examination continued by Mr. Murphy:

Q. Mr. Groom, have you prepared a revision of Libelant's Exhibit 1 pursuant to the direction of the Court yesterday? A. I have.

Mr. Murphy: I offer it in evidence and ask that it be substituted for the exhibit which was presented yesterday. 465

The Court: That is, Libelant's Exhibit No. 1.

Mr. Hall: That is all right.

(Marked Libelant's Exhibit 1.)

(Mr. Mount entered the courtroom.)

Mr. Mount: By approval, I would like to show your Honor a chart, just so that you may see the area in which these things happened.

The Court: I thought, if you could agree on it, you might take that chart and trace on it the course of the voyage and, during the course of the voyage,

designate certain dates which are of particular importance. For instance, if you determine where the ship was on December 7, 1941, that might be important. If you can determine the date that it received the radio to change its course, that might be another important point. The date that it went to Sydney; the date that it went first to Darwin, and went to Brisbane; then when it went on to Timor Island, and when it came back, and the date it was finally towed into—where was it towed into, into Brisbane?

Mr. Murphy: Into Brisbane.

The Court: (Continuing) If you could pick out those dates and agree on those dates among yourselves, and trace the course of the ship, showing the location of the ship on those dates, it would be more helpful than the bare chart itself.

Mr. Mount: My only thought was your Honor would see the three points, Darwin, Wyndham and Koepang.

The Court: I would be glad to use it now but I thought, before we finished the case, we might put in on the chart—we won't mark this chart in evidence—let the chart be marked for identification—showing the course of the ship or the location of the ship on these dates that we feel are or may be of importance.

Mr. Mount: This is a Geodetic Survey chart.

The Court: Thanks very much. In fact, I think I spoke to Mr. Murphy or Mr. Smith about this yesterday.

Mr. Murphy: Yes; your Honor did.

The Court: I think I know how to read the chart. This you don't have to put on the record.

(Discussion off the record.)

By Mr. Murphy:

Q. Mr. Groom, when did the Calmar Steamship Corporation first learn that the *Portmar* had been diverted by United States Navy orders to Suva in the Fiji Islands? A. That was the question I was answering yesterday, Mr. Murphy; about May 1st or 2nd, 1942.

Q. What happened on May 1st or 2nd, 1942, which gave you that information? A. The first officer and the crew returned to the United States and arrived in San Francisco about that time.

Q. Prior to that date Calmar Steamship Corporation 470
had word that she had been diverted, is that right? A. Yes, we had that telegram which was put in evidence yesterday of April 1st, from the captain, but that didn't say on whose orders. It just said, "Diverted."

Q. During all the events that occurred with respect to the *Portmar* from the time she left San Francisco, on November 28, 1941, and until she was towed to Brisbane and arrived at Brisbane on July 27th or thereabouts, 1942, did Calmar Steamship Corporation have any knowledge or information as to what was going on at the time it happened? A. Oh, no, Mr. Murphy. It was days and weeks, sometimes months, after the event before we knew about it. 471

Q. Of course, you had no prior information as to what was going to happen? A. No.

Q. What was the intent of the management of Calmar Steamship Corporation with respect to the *Portmar* and with respect to the voyage called for by the charter involved in this case? A. It was to carry out the terms of the charter and complete the round voyage.

Q. What was the ultimate port of destination of the *Portmar* on that round voyage? A. It was to a port or ports on the North Atlantic, north of Cape Hatteras.

Q. What was the port of registry of the *Portmar*? A. New York.

472 *Littleton Groom, for Libelant—Cross.*

Q. In what State was Calmar Steamship Corporation incorporated? A. It was and still is incorporated in the State of Delaware.

Mr. Murphy: Your witness, Mr. Mount.

The Court: We decided the Government should go next.

Mr. Murphy: Pardon me.

The Court: And then Mr. Mount will follow Mr. Smith.

473 *Cross examination by Mr. Smith:*

Q. Mr. Groom, did Calmar Steamship Corporation or anyone acting on behalf of Calmar Steamship Corporation make any effort to regain possession of the *Portmar* or to repair her after you received notice that she was stranded? A. We didn't know anything about it; the full situation, Mr. Smith——

Q. I think that can be answered yes or no? Did you? A. No.

Q. On direct examination you testified to various expenditures made by Calmar Steamship Corporation with respect to expenses after the beaching and stranding of the
474 *Portmar* on February 19th. Are all of those expenses included in claims which Calmar Steamship Corporation has made against its various underwriters? A. That is right.

Q. And is there any arrangement with respect to those claims and their ultimate disposition between Calmar Steamship Company and the underwriters? A. Not at all.

Q. Are any of those claims time barred at the present time? A. As far as I know, no.

Q. Will you tell me how you are sure of that fact?

The Court: Time barred with reference to the underwriters?

Mr. Smith: Underwriters, that is right.

A. Well, on certain of these items, Mr. Smith, for example, the repatriation, the claim for death of the seamen, slop chest, personal effects, there is an arrangement with the underwriters that they will abide the result of this main suit on the hull.

Q. But there is an arrangement of that nature? A. Oh, yes, there is an agreement, verbal.

Q. In addition to the expenses which form part of the Calmar Steamship Corporation's claim against various underwriters, did Calmar Steamship Corporation incur any expenses whatsoever of the sort normally incurred as 476
owner's expenses in the operation of the vessel pursuant to this charter after the *Portmar* stranded on February 19th? A. Other than those stated in the exhibit presented yesterday, no.

Mr. Smith: That is all.

Mr. Murphy: Will the Court bear with me a moment? I wish to ask the reporter if he will read to me the first question on cross-examination.

(Record read.)

Cross examination by Mr. Hall: 477

Q. Mr. Groom, was the charter party for the voyage of the Portmar, that is, Exhibit 3 here, negotiated in New York? A. We were told, Mr. Hall, that we would have—the vessel would be taken under a certain form of time charter, known as PR 970—that is also known as Columbian form of time charter—and in our telegram to the Maritime Commission we said that that was satisfactory.

Q. And the form of charter was then prepared by the Maritime Commission, wasn't it? A. Oh, yes, yes.

Q. You had no say about it? A. It was presented to us and we made one or two changes. One, as I recall, was that the port of redelivery was to be a port on the North Atlantic, north of Cape Hatteras. That was pursuant to

the telegram which we received from the Maritime Commission requiring that we deliver the vessel—or, requesting that we deliver the vessel to it.

Q. All the terms, particularly in part 2 of the charter party were prepared by the Government and given to you in that form to accept, is that correct? A. That is right.

Q. But you knew or were fully aware of the provisions of the charter party before the vessel ever sailed on this voyage from San Francisco? A. In general, yes, because we knew the form of PR 970 time charter. The time charter
479 was not actually executed until after the vessel had sailed.

Q. What orders did Calmar give to Captain Michelson regarding the voyage to the Philippines under this charter party? A. We gave him a copy of the proposed charter and instructed him to carry out the usual orders that were contained in circular letters aboard ship.

Q. Did you tell him to take his sailing directions from the Government? A. We did not.

Q. Did you ever give him any sailing directions? A. We did not.

Q. All the sailing directions that were received by Captain Michelson were received from the Government, weren't
480 they, from the time the vessel sailed from San Francisco? A. He so testified.

Q. Do you know anything to the contrary? A. No, sir.

Q. Had the *Portmar* always been used by the Calmar Steamship Corporation as a merchant vessel? A. It had.

Q. How long had the *Portmar* been owned by the libelant? A. We acquired her in 1930.

Q. At the time she sailed from San Francisco on November 28, 1941, was she armed? A. No, sir.

Q. No guns on her at all, that is, as part of the ship's equipment? A. No, sir.

Q. She sailed as a merchant vessel from San Francisco, is that correct? A. That is right.

Q. Are we to assume that all that you knew in New York about the condition of the *Portmar* on April 7th or

April 8, 1942, is contained in the various exhibits that were put in evidence here, particularly Exhibits 12, 13, 14 and 17, which were put in evidence here yesterday? Did you have any information outside of that about the condition of the *Portmar* on April 7th or April 8th? A. May I see those exhibits? Are they the telegrams from Michelson, the telegram from Malleson and the letter from Outler?

Q. 12, 13, 14, 17.

(Mr. Murphy hands exhibits to witness.)

A. Now your question, is this all the information we had as 482
to the condition of the vessel?

Q. Yes. A. That is right, that is all the information we had.

Q. You didn't know then that the *Portmar* was afloat on April 7 or April 8, 1942? A. No, sir.

Q. You didn't know whether any survey or inspection of the hull had been made by, anybody after she was beached? A. If it is not contained in this, we didn't know it.

The Court: You personally knew nothing of the *Portmar*. The only knowledge and information you had was what was conveyed to your company by communications from either the master or some 483
agents?

The Witness: That is right.

Q. Will you look at those exhibits and see if there is anything outside of the statement of the master, in Exhibit 14, namely, "Excessive damage makes salvage impossible," is there anything else in any of those documents that relate to the condition of the *Portmar* which you had on or prior to April 7 or April 8, 1942? A. Well, we have the telegram from Malleson, who were our Australian counsel, and reiterated by the master, stating that "Michelson considers constructive total loss and recommend we tender abandonment." We also have the letter from the Maritime Commission, Mr. Outler, which stated that "We have a dispatch

from the naval observer, Melbourne, reading as follows: 'Darwin advises the *Portmar* aground amidships to stern. Perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store.' " That is all the information we had.

Q. What was the date on which you received that last letter? A. This letter is dated April 3rd. We received it April 4th at 10.59 a. m.

Q. Did you see that letter before you sent the notice of abandonment to the underwriters? A. Oh, yes.

485 Q. I am referring to Exhibit 25. Will you please look at that? A. I have a copy of it.

Q. Contained in that schedule there, *Portmar* expenses, I assume are all the payments which were made at any time up to the present by the libelant resulting from the injury to the *Portmar*, is that correct? A. That is correct.

Q. What of those items do you claim should be paid by the underwriters that are sued as respondents in this action, that is, the war risk hull underwriters? A. That the salvage award——

Q. But I mean, where is that—I beg your pardon—where is that on the exhibit? Will you read the items from the exhibit? A. That is included, Mr. Hall, in the items

486 under 1, to Malleson Stewart, totalling $27,322.35, the salvage award and costs of $20,008.59 included in that.

Q. The items from 2 to 10, inclusive, you do not claim against the present underwriters at all, is that correct? A. Oh, no.

Q. Let us have them. A. No. 2 we claim from the underwriters, part of 3 we claim from the underwriters——

Q. What parts of 3 are claimed?

The Court: Have you a copy of this statement, Mr. Murphy?

Mr. Murphy: Yes, sir.

Have you an extra copy?

Mr. Hall: There is the exhibit itself, Judge.

The Court: You keep it, if you want to use it.

A. (Continuing) I have got it. Of the $1,643.99, we claim $346.87 of that as against the underwriters. That is for the items. Personal expenses leaving Darwin; expenses travelling from Brisbane via Sydney; expenses surveying ship, Brisbane; expenses at Sydney; fare to Melbourne, two trips; telegram to lawyers in Melbourne; payment for car hire; survey fee of R. Douglas Taylor and A. G. Horne; and then the cost of cables sent by Michelson—those were the cables that he sent to us.

Q. That included all the cables? A. No, that doesn't include all the cables, not our cables to him or to Malleson.

Q. But I meant, does it include all that Michelson sent? A. Yes. Then we claim wages paid to Captain Michelson from February 20, 1942 to his return to the United States. 488

The Court: If you are going to start in questioning items of $1.84, $17.85, I think we are going to run——

Mr. Hall: I did not make any stir about that.

The Court: I understand that there should be and there will be submitted to me a statement which will break up this Exhibit 25 into items which the libelant claims are charged to the respondent underwriters.

Mr. Hall: All right. 489

The Court: And that there will be no issue made on this trial as to the reasonableness of those expenses. I am only to determine the legal liability for them, if any.

Mr. Hall: Yes.

The Court: Am I right in my understanding?

Mr. Hall: I just wanted to be sure, when it came to making the computations here, we had overall computations that relate this time to the merits.

The Court: All right.

Q. When you received advices on the outcome of the salvage suit from Malleson Stewart & Company did you

490 receive a copy of the Court's opinion and judgment? A. Whether it was the same time, I don't know. I believe we had to write for that later, Mr. Hall.

Q. Have you a copy of the opinion here with you in court?

Mr. Murphy: I think we have one, yes. A. I don't have it.

Mr. Hall: I would like to have a copy to offer in evidence.

Mr. Murphy: If the Court please, it isn't in court
491 but we have it at the office.

Mr. Hall: All right, that is enough. You will produce it so we can offer it in evidence, will you?

Mr. Murphy: No, sir. I will produce it and you can look at it, but I will object to your offering it in evidence.

Mr. Hall: That's all right.

Q. Did you receive an itemized bill from Malleson Stewart showing what fees and expenses related to the salvage suit and what to other matters? Is that itemized in their bill? A. Yes, sir.

492 Q. Have you the copy of the bill there? A. That is the suit (handing paper to Mr. Hall).

Q. This is the only bill you have from Malleson Stewart for these services? A. For those services, yes, sir. We got a bill for a small amount that the master paid him, 29 pounds.

Q. Is that a claim against the underwriters in this suit? A. Yes, sir.

Q. When did Calmar first make any claim for payment for the title of the vessel *Portmar* as requisitioned by the United States on November 17, 1942? A. I don't recall the exact date we filed our libel in the Court of Claims. I believe it was February 1944. That is subject to check.

Q. Did you request payment at any time prior to that? A. We did not.

Q. How much have you ever received from the Government or what amount has ever been offered to Calmar Steamship Corporation for the reasonable compensation for the *Portmar* that was requisitioned?

The Court: That is two questions.

A. Nothing, to both questions.

The Court: All right, nothing, to both questions. 494

Q. When the charter hire deduction was made, I understand you to state that all of the charter paid for the month of February, subsequent to February 19, was set off on another bill by the United States? A. That is correct.

Q. Has full charter hire been paid up to the date of February 19, 1942? A. Except the $238 figure for feeding of these three passengers.

Mr. Hall: That is all.

Re-direct examination by Mr. Murphy:

Q. Mr. Groom, you were asked about your demand for 495 payment of just compensation for the requisition of title to the *Portmar*. I show you some photostats of letters and ask you if they refresh your recollection on that point? A. Oh, yes, they do.

The Court: I don't know how this has anything to do with the issues here.

Mr. Murphy: I don't think it has, your Honor, but you allowed broad cross-examination and I just wanted to correct one thing.

The Court: Even though he may have gone into it, he may, but why bother with it? I don't think it is within the issues here.

Mr. Murphy: All right.

The Court: It might become important if they received payment.

Mr. Murphy: May I ask just one question? I won't bother with the exhibit.

Q. Did you ask the Maritime Commission to determine, pursuant to statute, the amount of just compensation due to your company for the requisition of title to the *Portmar*? A. We did.

497 Q. When did you do that? A. Letter dated August 29, 1947 and a tracer dated October something 1947.

Q. October 29, 1947? A. October 29, 1947.

Q. Did the Maritime Commission ever determine the amount of just compensation? A. We got a letter from the chairman, April 1948, saying that since we had sued the Government, why, it wasn't necessary.

Q. Mr. Groom, you were asked by Mr. Smith as to whether you ever attempted to regain possession of the *Portmar* after the disaster of February 19. I will ask you to assume that the master's testimony in this case is that he attempted to go on board the *Portmar* at Brisbane and was barred by the Army authorities. Were you aware of

498 that when you made your answer? A. I had forgotten that.

Q. You were questioned by Mr. Hall as to sailing directions given to the *Portmar*. In answering Mr. Hall as to the sailing directions given by the Government, what did you mean by sailing directions? A. Directions on his voyage from San Francisco to Manila.

Q. Does your answer now refer to the port of destination of the vessel? A. Yes.

Q. Does it relate to any directions as to how the master is to navigate? A. Oh, no.

The Court: It does relate, however, to the course to take.

The Witness: Yes.

The Court: To reach the destination.

The Witness: Right, sir.

Mr. Murphy: Did your Honor say it does or does not?

The Witness: It does.

The Court: It does relate to the course he is to take.

Q. But as to the course to be followed, Mr. Groom, do such orders come from the Government as charterer or as sovereign through the Navy? A. We understood they came as sovereign through the Navy.

Mr. Murphy: That is all I have, your Honor.

Re-cross examination by Mr. Hall:

Q. Mr. Groom, how do you know they came from the United States as sovereign? A. You are asking me as a layman or a lawyer?

Q. I am asking you, in response to the last answer you gave——

Mr. Murphy: I will object to that as calling for a conclusion, your Honor. That cannot help the Court.

Mr. Hall: This is cross-examination.

The Court: The captain has testified, as I understand it, that when he left port he received sealed orders from the naval authorities. He opened the sealed orders. This seems to me to be a lot of nonsense. Objection sustained. He got sealed orders and he said he got them from the——

Mr. Murphy: Those are not charterer's orders. Those are naval orders.

The Court: That is my recollection of what he said.

Mr. Murphy: Your Honor is right.

Mr. Mount: Your Honor is right.

(Witness excused.)

The Court: As I understand it, as part of Mr. Groom's testimony, you are going to make another exhibit, which will be known as 25-A, in which you will list the items out of Exhibit 25 that you claim are chargeable against the underwriters in this suit; you are going to itemize them and set them forth?

Mr. Murphy: Your Honor will recall we used the term "sue and labor expenses." Those are the expenses——

The Court: You are going to pick them out of this Exhibit 25 and set them forth in a schedule which we will call 25-A, and they will be agreed upon, and I assume that they may be marked and received in evidence without calling Mr. Groom back to the stand.

Mr. Mount: Yes, without agreeing all the items are proper.

The Court: You don't dispute the reasonableness of the expenses but you dispute legal liability for them?

Mr. Hall: Well, may I explain this? One of those items is the captain's salary for the whole year while he was kept there by Calmar in Australia, and we say that doesn't apply to the physical damage of the vessel, which was what we insured.

The Court: Yes, but you don't dispute that the item charged for the captain's salary is reasonable in amount?

Mr. Mount: Oh, no.

The Court: You say you are not liable for it?

Mr. Mount: That is it.

The Court: You concede the reasonableness of the expenditure but you dispute liability for it?

Mr. Mount: Right.

Mr. Murphy: If the Court please, I offer in evidence the deposition of Axel Michelson, master of the *Portmar*, taken in these actions on July 17, 1945 and at subsequent dates.

As to the exhibits offered in connection with that deposition, many of them have been already offered in Mr. Groom's testimony.

I will offer the plaintiff's exhibits now, if the Court will permit, and I will do it as quickly as possible.

The Court: Before you offer the exhibits, let us 506
see what we are going to do with this deposition itself.

I will receive it in evidence without requiring that it be read, provided it is understood that all objections made in the course of the taking of the deposition are withdrawn, otherwise we will have to have it read.

Mr. Mount: We don't require it to be read.

Mr. Murphy: You withdraw all objections?

The Court: You withdraw all objections made?

Mr. Mount: Yes. There is one point in the minutes where I called on Mr. Murphy to produce the judgment of the salvage court: That has been 507
referred to this morning.

The Court: He said he will do it.

Mr. Murphy: I will produce it for Mr. Mount to look at.

The Court: He says he objects to its relevancy or competency, but he will produce it. But all objections on the deposition of the master are considered withdrawn by the respondent underwriters.

Mr. Smith: And by the Government too.

The Court: And by the Government too. And the libelant?

Mr. Murphy: We have no objection.

508 *Colloquy.*

The Court: If I find any in there, I will consider them withdrawn.

Mr. Murphy: Yes, sir.

The Court: Then we will mark the deposition in evidence.

(Marked Libelant's Exhibit 26.)

The Court: Now then, you tell me that the deposition, which was marked as Libelant's Exhibit 26, has reference to a number of exhibits which have exhibit numbers in the deposition itself, that some of 509 those exhibits have already been offered in evidence, and you will now proceed to offer the balance in evidence?

Mr. Murphy: Yes.

The Court: And I assume, as we receive them in evidence, you will follow along in numerical order but that these exhibits also have notations on them which will permit me to relate them to the captain's deposition, is that correct?

Mr. Murphy: That is correct.

I offer the profile and deck plan and general particulars of the *Portmar.*

510

(Marked Libelant's Exhibit 27.)

Mr. Murphy: I offer protest noted by the master January 22, 1942.

(Marked Libelant's Exhibit 28.)

Mr. Murphy: I offer a chart of the Harbor of Port Darwin with notations thereon by the master.

(Marked Libelant's Exhibit 29.)

Mr. Murphy: I offer photostat of a receipt dated February 21, 1942, certain documents being named therein.

511

(Marked Libelant's Exhibit 30.)

Mr. Murphy: I offer a memorandum from Lieutenant-Colonel Frank LaRue, Infantry, to Captain Michelson, dated February 26, 1942.

(Marked Libelant's Exhibit 31.)

Mr. Murphy: I offer protest dated March 23, 1942, before the Vice-Consul of the United States at Melbourne, Australia.

(Marked Libelant's Exhibit 32.)

512

Mr. Murphy: I offer extended protest dated March 25, 1942, signed by the master of the *Portmar*, and also by Joseph E. Bullock, mate; John V. Cumber, chief engineer; and Charles H. Matthews, deck engineer; and Ivan D. C. Steen, AB, dated March 25, 1942.

(Marked Libelant's Exhibit 33.)

Mr. Murphy: I offer protest noted by Captain Michelson before Edward James Hamilton, notary, at Melbourne, Australia, dated March 27, 1942.

(Marked Libelant's Exhibit 34.)

513

Mr. Murphy: I offer extension of protest, dated March 27, 1942, before said notary, Edward James Hamilton, at Melbourne.

(Marked Libelant's Exhibit 35.)

Mr. Murphy: I offer deck log of *Portmar* for the period November 20, 1941 to January 20, 1942, inclusive.

(Marked Libelant's Exhibit 36.)

Mr. Murphy: And a further deck log, continuing for the period from January 21, 1942 to February 19, 1942, inclusive.

514 *Colloquy.*

(Marked Libelant's Exhibit 37.)

Mr. Murphy: I offer photostat copy of official log of the *Portmar*, relating to the events beginning February 15, 1942 and following days.

(Marked Libelant's Exhibit 38.)

Mr. Murphy: I offer a letter dated August 1, 1942 from Captain Michelson to Captain Douglas Taylor, Brisbane.

(Marked Libelant's Exhibit 39.)

515

Mr. Murphy: I offer a letter from Captain R. Douglas Taylor, Brisbane, to Captain Michelson, dated August 4, 1942.

(Marked Libelant's Exhibit 40.)

Mr. Murphy: I offer a paper bearing the signature of T. G. Plant, Colonel, United States Army, Chief of Water Section, apparently a memorandum addressed to the Superintendent of the Army Transport Services, Base Section 3, A. P. O. 923, dated July 27, 1942, also bearing the signature of Captain Michelson, and a further notation by an officer named Grimm.

516

(Marked Libelant's Exhibit 41.)

Mr. Murphy: I offer a letter addressed to Captain Michelson, signed by one J. P. Williams, chief salvage officer, dated August 13, 1942.

(Marked Libelant's Exhibit 42.)

Mr. Murphy: I offer copy of a letter from H. F. E. Whitlam, Crown Solicitor, on the letterhead of the Commonwealth of Australia, to Messrs. Malleson Stewart & Company, Melbourne, dated August 19, 1942.

(Marked Libelant's Exhibit 43.)

Mr. Murphy: I offer copy of a letter from Captain Michelson to Malleson Stewart & Company, dated at Brisbane, August 14, 1942.

(Marked Libelant's Exhibit 44.)

Mr. Murphy: I offer copy of letter from Captain Michelson to Messrs. Malleson Stewart & Company, dated August 15, 1942, with an addendum of the same date and a further addendum of August 17, 1942.

(Marked Libelant's Exhibit 45.)

Mr. Murphy: I offer a report headed "Preliminary" by Lieutenant Commander A. G. Horne. This is a photostat copy of a handwritten document.

(Marked Libelant's Exhibit 46.)

Mr. Mount: Your Honor, I didn't object to the introduction. This is the report, you will remember, to which we referred, where we were not represented at the survey. It was an ex parte survey.

The Court: You call that to the Court's attention for the purpose of impressing the Court with the weight to be given to it?

Mr. Mount: Exactly.

Mr. Murphy: I offer an original survey report of R. Douglas Taylor, marine surveyor, and A. G. Horne, marine surveyor, dated August 14, 1942.

The Court: This is the survey at which there was joint participation?

Mr. Mount: That is in the same category as the preceding one.

The Court: Mr. Mount, I just wanted to straighten myself out on a point. At the time you were tendered abandonment did the underwriters undertake to make their own survey?

520 Mr. Mount: No.

Mr. Murphy: Oh, at the time? No, sir, they didn't. They did later. They attended later.

The Court: But they did not at the time they rejected abandonment?

Mr. Mount: No, because all we knew was in the cable that was sent to them.

The Court: But you rejected abandonment without making a survey at that time?

Mr. Mount: Yes.

521 (Marked Libelant's Exhibit 47.)

Mr. Murphy: If the Court please, Exhibit 50, offered in the master's deposition on August 1, 1945, is a batch of accounts dealing with the expenses, which I now understand have all been shown in the testimony of Mr. Groom. I simply wish to account for not offering that large batch.

The Court: You had better put it in evidence, even if there is no dispute, because we may look for it and not find it. So let us put it in and complete the record.

Mr. Murphy: I offer in evidence the account of
522 expenditures and disbursements made by Captain Michelson after the disaster of February 19, 1942, being a sheaf of papers annexed to an initialed statement of account.

(Marked Libelant's Exhibit 48.)

Mr. Murphy: I offer a copy of a joint survey made at Sydney, Australia, February 15, 1943. This, if the Court please, was called Underwriter's Exhibit A on the deposition, but I will offer it now as it is a fact in the case.

(Marked Libelant's Exhibit 49.)

Mr. Murphy: If the Court please, I now offer in evidence the deposition of the chief officer, Joseph E.

Bullock, taken at New York on or about August 2, 1945 in both these proceedings.

The Court: All objections are withdrawn?

Mr. Mount: I don't think we have any objections.

The Court: If you had, they are all withdrawn?

Mr. Mount: Yes.

The Court: By all sides?

Mr. Smith: Yes.

The Court: Then I will receive it.

(Marked Libelant's Exhibit 50.)

524 Mr. Murphy: According to our records, if the Court please, there were no exhibits offered in connection with Chief Officer Bullock's deposition. They were all put in under the master's testimony.

As I understand it, it has been agreed, at Mr. Smith's request, that the deposition given by Captain Michelson on December 5, 6 and 7, 1950, in the action now pending in the Court of Claims, is to be accepted in these proceedings as though the captain had testified here all over again.

The Court: Does it contain new matter?

525 Mr. Murphy: There are one or two new points that go a little beyond his former testimony.

The Court: Aren't you burdening me? I have an intolerable burden here now with a minimum of time to undertake it. I don't think that I should have to read through the same testimony twice. If you want to cull out certain parts of it——

Mr. Murphy: I would like to read into the record one or two questions.

The Court: That is fine.

Mr. Smith: If the Court please, may I suggest it be limited to the cross-examination and the exhibits connected with the cross-examination?

Mr. Murphy: No, there is one little thing here I want to get in from the direct that is not in this deposition——

526 The Court: You are going to bury it away in these minutes and when I come to review the case it might escape my attention. Why don't you take such portions of this deposition, which was taken in the Court of Claims litigation, that you desire to have marked in evidence in this case, and have them typewritten and placed in a separate volume and introduce them as an exhibit in this case?

Mr. Murphy: Will your Honor assign an exhibit number now to that?

527 The Court: Yes, we will give that the next number, 51.

Mr. Smith: Will that include the entire cross-examination?

Mr. Murphy: Anything you want to put in.

The Court: How many pages was your cross-examination?

Mr. Smith: It isn't much.

The Court: There is no objection to that, Mr. Mount? It is not a deposition in this case.

Mr. Mount: No, I think we may be able to have no objection to what they finally boil down to——

The Court: Yes.

528 Mr. Mount: —but I would not want to commit myself now.

The Court: All right, we will consider that you consent on the record now, and we will give you permission to withdraw your consent if, after examination, you find it is necessary to do so.

Mr. Mount: Thank you.

Mr. Murphy: In the course of testimony in the Court of Claims case, if the Court please, Mr. Smith asked the master to prepare from data which he did not have with him, but which he had at home in Oakland, California, a list of the positions through which he was ordered to pass by the sailing orders of the Navy which were given to him on sailing from San

Francisco. And Mr. Smith asked the captain to write those positions down on a sheet of paper. The captain had noted them, in order to preserve them in case the ship was lost or he was lost, on different pages in his Bowditch navigating manual, keeping them separated, so he could find them again if he had to find them, and he still had it. So the master went back to California and then prepared a sheet of paper which he mailed to Mr. Smith, with a copy to me, and I now offer in evidence that list of positions which the captain mailed to Mr. Smith, which 530
sets forth the track of his voyage as ordered by the Navy on departure of the vessel from San Francisco.

Mr. Mount: No objection.

(Marked Libelant's Exhibit 52.)

The Court: It is conceded that this Exhibit 52 is a statement of the positions through which the captain was directed to pass under the sailing orders at the time he set sail from San Francisco, at the commencement of the voyage, is that correct, Mr. Mount?

Mr. Mount: Yes.

531

Mr. Murphy: I offer in evidence a copy of the chart offered in evidence by the Government at the depositions in December, on which the master marked——

The Court: December 1950?

Mr. Murphy: December 1950.—on which the master marked, according to his then recollection, the various positions which the Navy ordered him to pass through, and on which he also marked the position he was at when he heard the news of Pearl Harbor, and the position he was at when he got the naval order of December 11 to go to Suva in the Fiji Islands. And on that chart we have plotted——

The Court: I thought you were going to get together?

532

Mr. Murphy: We are going to.

The Court: Then why put this in?

Mr. Murphy: All right, your Honor, I withdraw that.

The Court: You are going to get together and prepare a chart which will show the voyage of the vessel, and its location on the important dates.

Mr. Murphy: I withdraw that offer in response to the Court's remark.

The Court: Don't give me a photostat. Send down to the National Geographic Magazine and, for 25 cents, you will get a nice map of the Pacific and it will be something I will be able to read and will be helpful.

533

Mr. Murphy: The libelant rests, your Honor.

The Court: I am going to make a suggestion to the libelant, and the same suggestion I would like followed by the respondents' underwriters and Government. I think at the time you prepare your briefs there should be a list of the exhibits by numbers and a little description after each number, such as Libelant's Exhibit No. 1— I don't know what it is now—"charter party," and go right through with a little descriptive list. I think there also should be a separate list of the exhibits set forth in the depositions and those exhibit numbers in the depositions should be related to the exhibit numbers in this suit.

534

Mr. Mount: Parallel columns, you mean?

The Court: Yes. So that if I am reading the deposition and I see Exhibit No. 10 of the deposition, and I want to look at that exhibit, I will know where to find it.

Mr. Murphy: Yes, your Honor, we will do that.

The Court: And each side, at the end of this trial, will take their exhibits with them, and when you submit your briefs, send up in an envelope your exhibits and these statements of what the exhibits are and the statements relating the exhibit numbers

535

in the depositions to the exhibit numbers in the litigation.

Mr. Murphy: Yes.

The Court: All right?

Mr. Mount: Yes.

The Court: Mr. Smith, you are next. Are you ready now or do you want a five-minute recess?

We could even set forth an exhibit number for that map you are going to prepare.

Libelant's Exhibit 53 is now offered and considered in evidence and it is to be a map of the Pacific waters on which the voyage is to be traced, and the location of the ship is to be designated on dates of importance, and that is to be agreed upon by all the parties; and if you have difficulty, I will try to get you together.

536

Mr. Murphy: Yes, sir.

(Short recess.)

Mr. Smith: At the outset, I understand that all parties are now prepared to stipulate that the sound condition value of the *Portmar* at all material times to this proceeding was $688,000, is that correct?

537

Mr. Mount: That is correct.

Mr. Murphy: That is correct, your Honor.

The Court: I thought your libel alleged $800,000.

Mr. Murphy: No, that is the insured value.

The Court: That is the stipulated insured value?

Mr. Murphy: The $860,000 is the insured value named in the policy. This amount, $688,000——

The Court: Yes; that $800,000—odd is the stipulated insured value.

Mr. Mount: It is the agreed insured value.

The Court: What I would call the stipulated insured value in the policy.

Mr. Murphy: In the policy. This figure is the actual value, actual sound value.

The Court: What do you give it?

538

Mr. Smith: $688,000.

The Court: That is agreed.

Mr. Smith: I offer in evidence a duly authenticated copy of the naval routing instructions given to the *Portmar*, from which has been deleted by the Navy Department the list of points actually given the vessel's master, through which he was supposed to pass, but containing all of the other features of the instructions.

The Court: The points have been given by the captain.

539

Mr. Smith: That is right.

(Marked Respondent U. S. A. Exhibit A.)

Mr. Smith: I offer in evidence a duly authenticated copy of the naval dispatch sent by radio to the *Portmar* on December 7, 1941.

(Marked Respondent U. S. A. Exhibit B.)

Mr. Smith: I offer in evidence duly authenticated copy of the naval order sent to the *Portmar* on December 11, 1941 with respect to proceeding to Suva for further instructions.

540

(Marked Respondent U. S. A. Exhibit C.)

Mr. Smith: I offer in evidence a copy of a casualty report filed with the United States Coast Guard, signed by the *Portmar* master, dated March 26, 1943.

(Marked Respondent U. S. A. Exhibit D.)

Mr. Smith: I offer in evidence certified copy of a casualty report signed by the president of Calmar Steamship Corporation with respect to the *Portmar*, dated July 6, 1942.

Mr. Mount: I have no objection to that. The Court will, of course, note that whatever the presi-

dent of Calmar said was based only on information that he had received.

(Marked Respondent U. S. A. Exhibit E.)

The Court: Let me see if I fully appreciate the effect of this stipulated sound value of the vessel.

If I find against the Government, then the maximum amount that could be awarded—

Mr. Smith: No. I don't believe that the value of the *Portmar* has any bearing in these proceedings except this: We say that under the charter party we are not bound by the insurance value— 542

The Court: That is right.

Mr. Smith: —and that we consider that the value of the *Portmar,* for the purposes of determining whether she is a constructive total loss within the meaning of the charter party, is her actual value on material dates. It has now been stipulated that that actual value is $688,000. In the Court of Claims I think that that value will have other significance with respect to the Government liability, but in this proceeding I think it is limited to that.

The Court: I am to determine here, as I understand my function, the question of damage as well as 543 liability.

Mr. Smith: That is quite true, and the Government maintains, of course, that it is not liable in these proceedings for the value of the *Portmar,* either the insured value or the actual value.

The Court: Yes, but if I determine that in these proceedings the Government is liable for the value of the vessel at the time it was damaged, the effect of this stipulated sound value, I take it, on first blush without looking at the law, would limit the recovery against the Government to $680,000-odd, whatever the stipulation says.

Mr. Smith: If your Honor finds that the Government, as Mr. Murphy contends, is liable for having

prevented them from collecting the insured value from their underwriters, the Government might be liable for $860,000.

Mr. Murphy: That is our point.

Mr. Smith: We contend that there is nothing whatsoever to that point. If your Honor finds that the Government is liable for the actual value of the *Portmar*, the actual value of the *Portmar* has been stipulated for all purposes of this case at the figure stated.

545 Mr. Murphy: I think that is a correct statement.

The Court: Since the liability of the Government for the damage done to the *Portmar* arose out of the contract, and the libelants were insured in a greater amount, then if they are entitled to recover, they would be entitled to recover the greater amount, the insured value,—

Mr. Murphy: That is right.

The Court: —because it was the amount within the contemplation of the parties?

Mr. Murphy: That is right.

Mr. Smith: No, if your Honor please—

546 Mr. Murphy: Your Honor stated our contention correctly.

Mr. Mount: Exactly.

Mr. Murphy: That is my contention.

Mr. Smith: The Government doesn't concede that.

The Court: No, but that is the libelant's contention.

Mr. Murphy: All we are stating here are respective contentions.

The Court: I was just trying to determine, if I could, the legal significance of the stipulated sound value in my own mind.

Mr. Smith: The only stipulation has been that the sound value of the vessel for all purposes of these proceedings, so far as material, is $688,000.

THOMAS G. PLANT, called as a witness on behalf of the respondent U. S. A., being duly sworn, testified as follows:

Direct examination by Mr. Smith:

Q. What is your address, Colonel? A. Santa Rosa, California.

Q. Have you been connected with the shipping field in the course of your lifetime? A. From 1907 until I retired in 1948.

Q. Will you state briefly your experience in that field? A. Most of the period was with the American-Hawaiian 548
Steamship Company, the last 25 years of which I was vice-president in charge of operations.

Q. In 1942 were you part of our armed forces? A. I was commissioned in the Army and sent overseas.

Q. What commission did you obtain? A. Colonel.

Q. What assignment did you receive? A. I was sent from Washington to be Chief of Water Transportation in the Southwest Pacific area, to organize and to operate water transportation down there.

Q. When did you receive that assignment? A. The early part of February. About the 3rd of February.

Q. When did you proceed to the Southwest Pacific area? 549
A. I left New York on the 11th intending to fly right through by air. We were interrupted in the Middle East and finally had to proceed by surface transport. We arrived there the end of March.

Q. When you arrived in Australia where did you set up shop? A. In Melbourne.

Q. Could you tell us something of the conditions that existed in Australia at the time of your arrival, with particular reference to the condition of water transport generally in the area? A. No. 1, the Army Command was in process of organization under General MacArthur as the Supreme Commander. Preceding his arrival in Australia, scattered air men and other units that had arrived there,

550 under their superior officers, had done whatever they could to take preliminary charge of the situation. Vessels had put in there for refuge, and had been diverted to Australia from many other intended destinations, and even at the time of my arrival many vessels were there with cargo still on board them, not unloaded.

Q. Did you know of the nature and usefulness of various cargoes aboard vessels? A. In many cases we did not, Mr. Smith.

Q. Can you tell us something of the military situation at that time? A. Well, the Japs had driven as far East as 551 to include all of the Dutch East Indies. They had made an air strike on Colombo, in the middle of March, which had been repulsed. They had penetrated all along the north coast of New Guinea. The invasion of the northern part of Australia was threatened. The Cape York Peninsula had been ordered evacuated down to Brisbane. The defense line had been set up 15 miles north of Melbourne. Melbourne is on the south coast. All of which, I think, indicates the seriousness of the military situation.

Q. What was the situation at Darwin so far as you were advised? A. Darwin had been heavily bombed on the 19th of February, many ships sunk and the town virtually de- 552 stroyed. The Navy had left Darwin, the few naval units we had, and had proceeded to Exmouth Gulf on the West Coast.

The Court: Where had they proceeded?

The Witness: To Exmouth Gulf, your Honor. It is about halfway down the west coast of Australia. They made a base down there.

Could I point it out for you, sir?

The Court: I see it here. It is quite clear. It is quite a distance down the coast. Down to here (indicating).

The Witness: That is it. That is about halfway down. This covers only the northern half (indicating chart).

The Court: About how many miles would you say that was?

The Witness: From Darwin?

The Court: To the southwest of Darwin.

The Witness: Should be 1500 miles.

The Court: And the Navy had abandoned Darwin?

The Witness: Yes.

The Court: Pulled out. Were there any armed forces up there?

The Witness: There were a few. There was a 554
small detachment of soldiers——

The Court: Where had the defense line been set up?

The Witness: —on the Cape York Peninsula.

The Court: That is where?

The Witness: Over here, Cape York Peninsula (indicating). We had, in the extreme northerly end, a detachment of 50 American soldiers. Those were the most northerly troops we had on the York Peninsula.

Q. What was the situation with respect to the need for 555
military materiel and equipment of all kinds at that time? A. Well, we were in the process of trying to get troops, to begin with. As to equipment, the whole job initially was to discharge ships that were there, sort out their cargo, find out what they had, and to find out where they could be used to the best advantage. So we did the best we could under the circumstances.

The Court: Who had possession of the Timor Islands?

The Witness: The Japanese.

The Court: And the Tanimbar Islands?

The Witness: And then clear over to include Sumatra, clear to the westward, and from Sumatra

556 westward they had actually bombed the Island of Ceylon and the Port of Colombo.

The Court: One more question for my own information: What was the distance south of the Tanimbar Islands—from the Tanimbar Islands to Darwin?

The Witness: From latitude 15 north to latitude 9 north. 5 degrees, 300 miles.

The Court: 300 miles?

The Witness: 300 miles, roughly.

The Court: The Japs were only 300 miles away
557 with armed forces from Darwin?

The Witness: Yes, sir, and submarines in the sea.

The Court: And submarines what?

The Witness: In the sea, and surface craft as well.

The Court: You mean Japanese submarines?

The Witness: Yes, sir.

The Court: And Japanese surface craft?

The Witness: Yes, sir.

The Court: All right.

558 Q. What were your responsibilities with respect to the dispatching of craft and making of decisions with respect to carriage of cargo and the like? A. The procurement and the assignment of all vessels on all military and supply missions.

Q. What vessels did you exercise control with respect to? A. Every vessel we could get our hands on. There weren't very many down there. Australia had been in the war with Great Britain for two years. The empire had drawn practically all coastal ships from Australia.

Australia's life depends on coastal shipping and they were desperate for covering their own needs, so we had very few Australian vessels we could depend upon. Some 21 small Dutch vessels had escaped when the Dutch East

Indies were seized by the Japanese, and some of those were heavily bombed and damaged. We got those and repaired those. In the meantime, we were looking around desperately for anything that was afloat or could be made to float.

The Court: Where did you repair those?

The Witness: The Dutch ships were repaired in various ports from Brisbane south to Melbourne.

The Court: When were those repairs made?

The Witness: Beginning from the time they arrived there. They escaped to Australia and the repairs were made as rapidly as the very limited 560
facilities permitted. Some weren't completed until the end of 1942.

The Court: Until the end of 1942?

The Witness: Until the end of 1942.

The Court: I am talking about facilities available. I should be interested to hear about that.

The Witness: If I may comment on that, your Honor.

The Court: Yes.

The Witness: Australia has never been an industrial country, and particularly has never been a shipbuilding country. Their ships have been built 561
in Great Britain. They had a very limited number of repair yards. So the facilities weren't there.

Q. Did it make any difference with respect to the control which you exercised over vessels at that time whether or not they were owned or chartered to the United States or any government? A. None whatsoever.

Q. In making decisions with respect to dispatching vessels to various points did you regard commercial considerations of any sort? A. No, sir, military only.

Q. Were you advised as to the situation that existed with respect to controlling vessels prior to your arrival? A. I was given very complete authority in Washington to

take any ship in Australia and to do what we pleased with it.

Q. Did you have any official information as to the practices followed by military authorities with respect to controlling vessels in Australian waters prior to your arrival? A. Well, I understood that they had exercised the same authority before I arrived there.

Q. And for how long before you arrived? A. From the time the first elements arrived.

Q. When was that, about? A. Not awful long after
563 December 7, 1941, because many ships on the high seas at that time with military units aboard were diverted to Australian ports.

Q. Could you keep your voice up a little bit? What was the first you learned about the *Portmar*? A. Within a very few days—almost immediately after I arrived in Melbourne.

Q. Will you tell us what first brought that vessel to your attention? A. I cannot say for sure whether I learned it from Army officers there or from Captain Williams, but the first knowledge I had of the *Portmar* was that she had been sunk in the Darwin raid, that she had artillery aboard that was badly needed, and that Williams, a private salvor, had gone to Darwin to get the guns out of the ship. Some little
564 time after that, in fact, very shortly, Williams came in to see me and told me he had gotten the artillery out of the *Portmar* and that the ship was much less badly damaged than he had thought and others had thought, and that he was sure he could get it up. I said, "Get it afloat."

The Court: When did he tell you that, as best you remember?

The Witness: A very short time after I arrived there. As to the date, I cannot say.

The Court: Was it May or April?

The Witness: I would say it must have been late in March or the very first part of April because the *Portmar* was one of the first matters that came up.

Q. Subsequent to that conversation with Mr. Williams did you have further communications with Mr. Williams? A. I did, after the ship had been floated.

Q. In general what was the nature of your relations with Mr. Williams? A. Williams, when I dealt with him, was the chief salvage officer for the Commonwealth Salvage Board. Between the salvage of the artillery from the *Portmar* and our arrangement to get the ship afloat, the Commonwealth had taken over all salvage activities in Commonwealth waters and Williams had gone in as chief salvage officer.

566

Q. Did he make reports to you from time to time as to the progress of the salvage operation? A. Only after he had returned because communications were out of the question. You couldn't communicate anywhere, and I didn't hear from him until he came back.

Q. Did he report to you what was done in connection with the *Portmar*? A. Yes, sir, the ship was afloat and she was in condition to be towed.

The Court: Why was communication impossible from Darwin?

The Witness: Well, the telephone network in Australia is very archaic, your Honor, and even with 567 the assistance that the Signal Corps lent them, it was almost a year before we had any communications that were worthwhile. There is no through rail line to Darwin. Part of it is by rail and part by truck over a very bad desert road.

The Court: How far does the railroad line extend?

The Witness: The rail line runs, from the south, from Adelaide about, guessing at it, 1500 miles up to a place in the James Mountain Range, Alice Springs, and then you take off and go about 500 miles through the desert by truck to a little town, Tennants Creek, and then you go about 500 miles by narrow gauge railroad up to Darwin.

Mr. Murphy: Did you say "narrow gauge"?

The Witness: Narrow gauge, yes, sir.

The Court: In March 1942 had there been any landing of the Japanese in Melville Island, do you know?

The Witness: Not that I recall.

The Court: Had there been any landing parties of Japanese in any of these areas in the vicinity of Darwin?

The Witness: No.

569 The Court: Or the York Peninsula?

The Witness: No, sir.

The Court: Could you tell us whether the waters in the vicinity of Darwin or Melville Island were under the control and domination of the Japanese armed forces?

The Witness: They were after February 19, your Honor, because the only naval forces that we had had there left Darwin after the bombing on the 19th.

The Court: That continued for how long, would you say?

The Witness: I don't recall that there was any

570 attempt at penetration northward until late in 1942.

Q. Colonel, I show you what purports to be a copy of a letter addressed to you by Mr. Williams, and an attachment, and ask if that will help you to refresh your recollection as to what Mr. Williams reported to you was done in connection with the salvage of the *Portmar* by him? A. Generally it does, Mr. Smith, yes, sir.

Q. Could you tell us what Mr. Williams reported that he did in connection with the salvage operation of the *Portmar*? A. You mean in detail?

Q. In as much detail as you can, remembering that the——

The Court: Is this paper the Colonel looked at a communication from the master?

571

Mr. Smith: A communication from Mr. Williams to him.

A. Pumps were procured and placed on board. And due to the extreme rise and fall of the tide at Darwin, some 27 feet, the after hatches were exposed at low water. With high capacity pumps, Williams was able to partially free the after compartments of water and to get some sort of patches on the shrapnel holes, that is, to make a temporary repair job to the skin of the ship, and eventually, by repeating that process on successive tides, he got the ship free of water and kept it free with pumps.

572

Q. Where were the pumps obtained? A. In Adelaide, I believe. They came from the south and they went north by rail and truck.

Q. Could any commercial interest have obtained those pumps at that time? A. I doubt it very much because all salvage operations—all salvage equipment was under the control of the Government.

Q. Was the Government allocating any salvage equipment to commercial interests? A. No, sir.

Q. After the *Portmar* was gotten afloat were arrangements made to tow her anywhere? A. Yes, sir.

Q. Will you tell us about this? A. Arrangements were made through Captain Williams to obtain tugs and to tow the vessel to Brisbane, which was the nearest safe port.

573

Q. Can you tell us what Captain Williams reported to you concerning the progress of that tow? A. Well, there was no possibility of obtaining any naval escort in waters dominated by the Japanese, so that the personnel of the tug had to be carefully picked, realizing they were undertaking a very hazardous voyage, and largely they ran by night and anchored by day, holing up in coves where they could. They made quite a long detour around Melville Island and through the Gulf of Carpenteria. I could point that out to you, north of Melville Island (indicating).

The Court: Just describe that again.

The Witness: Leaving Darwin, the tow proceeded around Melville Island, around Groota Eylandt, inside of the Gulf of Carpenteria, out through Torres Strait, and then down the coast to Queensland.

The Court: Following the shoreline?

The Witness: Following the shoreline, and by daytime, wherever they could, holing up under cover so the Jap airplanes and Jap subs, surface craft, couldn't spot them and sink them.

575 The Court: Were they traveling through an area——

The Witness: Completely dominated by the Japs.

The Court: —subject to bombing?

The Witness: No bombing because it is almost completely unpopulated there.

The Court: Completely dominated——

The Witness: Completely dominated by the Japanese.

The Court: They had control over all this area and control over the waters too?

576 The Witness: Yes, sir, that is true in this area here. When you come off the coast of Queensland there was a different situation.

The Court: After they rounded the point?

The Witness: After they rounded the point.

The Court: But until they rounded the point, the waters were Japanese-controlled?

The Witness: Japanese territory.

The Court: So they sailed this through enemy-controlled waters?

The Witness: Yes, sir.

Q. In your estimation, Colonel Plant——

The Court: One more question. Who manned the ship on that voyage?

The Witness: An Australian salvage crew, Australian seamen.

Q. In your estimation, Colonel Plant, could arrangements have been made commercially to have that tow performed? A. No, sir.

Q. Why was it undertaken, Colonel Plant? A. Because the ship still had some usefulness to her if someone could get her to a place where she could be repaired.

Q. To whom did it have most usefulness? A. To the Army.

578

The Court: From your knowledge of the conditions would you say, as the ship lay on the beach, that it had usefulness to its civilian owner?

The Witness: He couldn't do a thing with it, your Honor. He was in a helpless position.

The Court: Why was he helpless?

The Witness: He couldn't obtain facilities or personnel to raise the vessel. Even if he had succeeded in doing that, he couldn't move it. There were no repair facilities there. The third point, even if he had moved the vessel to a repair port, he then couldn't have had the vessel repaired. There were three strikes against him right from the start. 579

The Court: What were the possibilities of him overcoming those strikes, as you described it?

The Witness: I would say none whatsoever.

The Court: Was there any immediate prospect of changed conditions?

The Witness: I would say the situation got worse from that standpoint as the year progressed.

The Court: And it remained worse until how long?

The Witness: We were in the low priority, your Honor. The campaign in Europe had No. 1 priority and we got what was left out there. We were strapped until things began to improve in Europe in 1944. We were on shortcomings the entire time. We

made our first landings in New Guinea on rafts made out of the trunks of cocoanut trees, palm trees.

Q. When the *Portmar* arrived at Brisbane did you have an opportunity to see her? A. I did.

Q. Were reports made to you about her condition? A. They were.

Q. Will you tell us something about the shape she was in when she arrived at Brisbane? A. She had been under water—the major part of the ship had been under water for some time. She was completely coated with oil and
581 muck and debris. A full examination as to her physical condition was not possible until she was cleaned up.

Q. What facilities were available at that time for making repairs to the *Portmar*? A. Commercial facilities?

Q. Yes. A. None.

Q. What facilities were available to you? A. None.

Q. How did you go about obtaining facilities to make repairs at that time? A. Well, if I could explain, Mr. Smith, in the first place; as I said before, Australia is not a shipbuilding country, not an industrial country, and the shipyards were few and far between at the best. What there were were solidly under Navy control. The Navy had
582 priority. They had had the Battle of the Coral Sea. Every facility in Australia had some naval unit being repaired. We could not get any priority for commercial craft at all.

Q. In other words, all of the Australian shipyards were filled with warships damaged in the Battle of the Coral Sea, is that correct? A. You say all. I don't know whether there was any facility in Adelaide or not, but everything on the east coast was. I cannot recall any facility in Adelaide. But we couldn't get a priority. I think that that was the important point. We couldn't get any priority for the work.

Q. What was the situation in respect to effecting repairs in the United States at that time, if you know? A. Couldn't get any work done here either.

Q. Can you tell us on what you base that? A. At that time and thereafter we had numerous vessels seriously damaged which we wanted to have repaired and got into service again. I repeatedly communicated with the War Department and with the War Shipping Administration in Washington and had been told to forget it, that if we couldn't do the job ourselves, they couldn't help us; that they were so busy in the States with new construction and the repair of combat and other craft more essential, that it was out of the question to take on any repair work for us, they couldn't do it here.

Q. What did you do with respect to the *Hortmar* when she arrived? A. We did the work ourselves with Army personnel. 584

Q. Will you outline for us what steps you took? A. We had had assigned to us some so-called Quartermaster battalions, which were battalions to be trained in stevedoring work in the islands after the campaign got under way. One of those battalions was newly arrived in Australia. I took a company from the Quartermaster battalion, gave them to Major Haggett, who was an experienced ship master and experienced in ship reconditioning and ship repair, and gave him the orders to go ahead and to get the ship in shape. So that we undertook the job with military supervision and military personnel out there. 585

Q. What materials did you have available to you to do the work? A. We had the wreck of an old ship and we had a scrap pile in the shipyard.

Q. Were reports made to you from time to time of the progress of the work? A. They were.

Q. Can you tell us in a general way what was done as the work progressed? A. We undertook to make the ship seaworthy, that is, to make her hull watertight, structurally strong, to take care of the bilge and ballast and pumping system, all of the things that would make the ship seaworthy but without any thought at all of restoring her to her pre-

vious condition or to class, just to get her back so she would float and could operate safely.

Q. Where was the work performed? A. At Brisbane mostly.

Q. Was some of it done at Sydney? A. Eventually she proceeded south under her own power for drydocking and some further work on drydock.

Q. Would you characterize the work that was done at Brisbane as work necessary to restore the vessel to class and commercial operating condition? A. No, sir.

587 Q. Will you tell us just how you would characterize that work? A. It was strictly a patch job, Mr. Smith, nevertheless to make the ship perfectly seaworthy, but without any thought at all of restoring the vessel to commercial operating condition. We took scrap plate, for example, and welded up hundreds and hundreds of shrapnel holes in her hull. No one would have accepted a repair job of that character but, nevertheless, it made the hull tight.

Q. After the patch job which you had done on the *Portmar* was completed, was the *Portmar* used again? A. Yes, sir, we put her into commission and used her.

Q. How long did you use her? A. We got two or three trips out of her. Then she was torpedoed and sunk with
588 the cargo.

Mr. Smith: I have no further questions.

Cross examination by Mr. Murphy:

Q. Colonel Plant, can you give us the date on which the *Portmar* was torpedoed and sunk? A. No, sir, I cannot, Mr. Murphy. I am sorry that I haven't got it.

Q. Can you make a rough approximation? A. 1943 because we got her in commission the very latter part of 1942 and she could easily have completed two or three voyages in the next mid year.

Q. You have told us that when you got to Australia, if I understood you correctly, the Japs were in possession of the Island of Tanimbar? A. Yes, sir.

Q. Do you know, and if you don't, tell us, when the Japs actually got possession of the Island of Tanimbar? A. No, sir, I do not know.

Q. Can you give us the date on which the tow of the *Portmar* began from Port Darwin towards Brisbane? A. I cannot, Mr. Murphy. I haven't checked it and I didn't get that date.

Q. I suggest to you that it was after the Battle of the Coral Sea. Would that agree with your recollection? A. It would.

Q. Are we to understand that even after—— . A. I 590
pointed out in explaining the chart to his Honor, Mr. Murphy, that from Torres Strait south, the Coral Sea area had been pretty well secured; Torres Strait to the westward, no.

Q. But even after the Battle of the Coral Sea, the Japanese still remained in control of the northern waters west of Torres Strait. A. They sent submarines into Sydney Harbor in July 1942—penetrated Sydney Harbor.

Q. According to your recollection was the Battle of the Coral Sea about the 4th to the 9th of May? A. Yes, sir.

Q. 1942? A. Yes, sir.

Q. Did I understand you to say that the crew that rode 591
the *Portmar* and men that handled the tugs were picked men? A. They were picked men.

Q. Were they military, naval or Army men? A. I can't say. I can't say, except that Captain Williams told me that he had picked a crew.

Q. The enterprise was considered a hazardous enterprise? A. It was, recognized from the beginning.

Cross examination by Mr. Mount:

Q. Colonel Plant, I have just two questions. When you arrived in Australia, do you know whether Captain Williams had already started the salvage of the *Portmar*? A. My answer is no because I arranged with him to actually

raise the vessel. He may have started on the salvage of the artillery, Mr. Mount, but not the ship.

Q. The arrangements for the salvage of the ship, you say— A. Were made by——

Q. —were made by you with Captain Williams? A. Made by me with Captain Williams. There were two operations. She had a lot of artillery aboard, which were urgently needed, and the Army arranged with Williams to get them out. During his removal of the guns he discovered that the ship could be raised. He came to see me and told
593 me that, and I told him to get the ship afloat.

Q. Did he say to you at any time that the master of the *Portmar* had said he was abandoning the ship? A. I can't recall that.

Mr. Mount: That is all.

The Court: I have just one question, Colonel. Can you tell me why the ship was brought around Cape York over to the east coast and why it wasn't brought down to some port on the west coast?

The Witness: For one thing, your Honor, there is nothing on the west coast, except the little port of Freemantle, where you come around on the Great
594 Australian Bight, and there is nothing further to the eastward until you come to Freemantle, and you have the Great Australian Bight to cross, which is one of the most tempestuous bodies of water in the world. So this (indicating) gave them plenty of cover, shelter, havens and everything else, and it brought us to the nearest——

The Court: The only course that was advisable to take was the course right through the enemy's waters?

The Witness: Yes, sir. In fact, they patrolled to the westward, so you didn't escape the enemy patrols whichever way you went.

The Court: You wouldn't have——

The Witness: You wouldn't have escaped them until you got away down the coast, but you could expect their subs and aircraft everywhere.

The Court: All along the west coast?

The Witness: Yes, sir, because they ultimately occupied all of the Dutch East Indies to and including Sumatra and dominated everything down the coast.

(Witness excused.

The Court: We will take a recess until a quarter to two. 596

(Recess until 1:45 p. m.)

AFTERNOON SESSION

HAROLD W. HAGGETT, called as a witness on behalf of Respondent United States of America, being first duly sworn, testified as follows:

Direct Examination By Mr. Smith: 597

Q: Captain Haggett, will you state your address? A. 554 Fifty-third Street, Brooklyn.

Q. Have you had any experience in the ship field? A. Since 1917.

Q. Will you outline briefly what your experience has been? A. Enlisted man in the Navy, 1917-19; I attended Government Navigation School and secured a third mate's license in January 1920: served as an officer until about January 1921. Ashore at various jobs until July of 1923, when I came with the American-Hawaiian Steamship.

Q. In what capacity did you serve the American-Hawaiian Steamship? A. Various grades of officer, including chief officer.

598 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

Q. Did you do any shore work for them? A. Came ashore in April 1929, and stayed there until 1942, when I was taken into the Army.

Q. In what capacities did you serve ashore for the America-Hawaiian? A. Mostly in charge of loading and discharging operations, some reconditioning and repairing.

Q. Will you tell us something about the reconditioning and repairing work you did? A. Numerous minor jobs in the shipyards, and conditioning of the Ohioan, which was sunk in New York Harbor, raised and reconditioned,
599 the Texan, which was damaged in Port Newark, New Jersey, and was laid up for reconditioning.

Q. How extensive was the Ohioan job? A. Why, that was about a three-months job. She was sunk with a full cargo in New York Harbor, raised, cargo discharged, and replaced plates in the starboard side.

Q. What was the nature of the reconditioning of the Texan? A. The Texan was practically the same, replaced hull platings, things of that sort.

Q. Where was the work done in both cases? A. In the Ohioan, at 56th Street, Brooklyn; Texan, at Brewer's Drydock, Staten Island.

Q. When you went in the Army in 1942, what rank
600 did you acquire? A. I was commissioned a Major.

Q. What was your assignment? A. My first assignment was to go to Australia for further assignment there. I was assigned to the Water Transportation Corps in Melbourne.

Q. When did you arrive in Australia? A. About August 15, 1942.

Q. What was the first that you learned about the *Portmar*? A. Why, I saw her lying at Brisbane when we arrived there, but officially I didn't know anything about her until I had reported to Colonel Plant at Melbourne and was assigned to recondition the vessel.

Q. Where was the *Portmar* when you were assigned to recondition her? A. She was lying at Brisbane.

Q. Will you tell us something of what you did in connection with reconditioning the *Portmar*? A. We obtained the services of the 387th Port Battalion, one company, plus some mechanics from the different repair facilities in Brisbane, cleaned the vessel up, and overhauled the machinery sufficiently to get her running, patched the holes in the sides and superstructure, renewed the booms, rigging, where necessary.

Q. Well, now, when did you go aboard the *Portmar* in order to start reconditioning work? A. That was sometime early in September. 602

Q. Will you give us some statement of the condition of the *Portmar* at the time you went aboard her? A. At that time all the after quarters, 4 and 5 lower holds were covered with fuel oil, filth, and extended forward into the after end of No. 2 lower hold, as though all that part of the ship had been under water.

Q. Could you get any accurate idea of her condition at that time? A. No, we had to get her cleaned up before we could think what had to be done, outside of the visible damage such as the holes.

Q. Did you proceed with the cleaning work? A. Yes, we proceeded immediately with that. 603

Q. As you cleaned it up did you inspect the vessel from time to time? A. I was on the vessel constantly while the work was being carried out, making numerous inspections.

Q. Can you give us some idea of the nature and extent of the damage that you found on the *Portmar* as she was being cleaned up? A. Well, the most damage to the hull was numerous holes along the port side as far forward as No. 2 hatch, and the superstructure, stack, quarters, were holed in various places. The after holds had to be cleaned out, fuel oil; discharged cargo that had been left in the vessel; and refurnished the after quarters completely, after cleaning the fuel oil out of them and whitewashing them.

Q. What was the condition of the booms? A. We replaced several booms that had been badly holed by

machine-gun fire, and not being safe to use, others we left on the vessel.

Q. What was the condition of the deck machinery? A. The deck machinery was in very poor condition. We used compressed air during the cleaning process to hoist light loads, but when we got down to Sydney and tried to put a test on it, we found that a lot of cylinders and so forth were worn out and had to be repaired.

Q. What was the condition of the double-bottom tanks? A. The double-bottom tanks, particularly in Nos. 4 and 5,
605 were shaken and leaking badly along the margin plate. I had to put steel wedges and shims in before they could be caulked to be made tight.

Q. Captain, I hand you Libelant's Exhibit 47 and ask you if at my request you examined a copy of this survey report? A. Yes, I have seen a copy of it.

Q. Can you state how the condition of the *Portmar* as stated in that survey report accords with your recollection of the vessel from your inspection? A. Why, very similar to what we found when we started overhauling the ship.

Q. You think that survey report is substantially correct? A. I think so, yes.

606 Q. Captain, did you have occasion to inspect the *Portmar* in company with any surveyor from Lloyds? A. The Lloyds surveyor came aboard several times.

Q. Did you have any conversations with the Lloyds surveyor? A. I had several conversations but nothing official.

Q. Can you give us the substance of the conversations you had with Lloyd's surveyors?

Mr. Mount: Excuse me. May I qualify this witness's description of Lloyd's surveyor? Because, as Mr. Smith knows, there is a Lloyds Corporation, which is not the underwriting members of Lloyd's. I just want that clear. May I ask the witness that question?

Harold W. Haggett, for Respondent U. S. A.—Preliminary Cross. 607

Mr. Smith: Go right ahead.

Mr. Mount: When he said he conferred with Lloyd's surveyor——

The Court: Yes.

Mr. Mount: —the underwriters were not represented here.

The Court: Yes.

Preliminary cross examination by Mr. Mount:

Q. Let me ask you, Captain, when you speak about a 608
Lloyd's surveyor, you mean the surveyor of the Lloyds Corporation, don't you? A. Actually I don't know. He just represented himself as being from Lloyd's and I took him at his word.

Q. You don't know that he was the representative of the underwriting members of Lloyds? A. I don't know who he was other than the fact——

The Court: Do you dispute that the surveyor that participated in this survey, Libelant's Exhibit——

Mr. Smith: No, this is the American Bureau survey. There was a subsequent survey.

The Court: I thought you were referring to the 609
subsequent survey. You don't dispute that you participated——

Mr. Mount: No, not in the Sydney survey, but we did not participate in the Brisbane survey.

The Court: That is right.

Mr. Mount: There may have been a Lloyds surveyor at Brisbane, but that would be what is known as Lloyd's agent.

The Court: Not the agent?

Mr. Mount: Not the agent of the underwriters.

The Court: Not the agent of the underwriters in this suit.

Mr. Mount: That is it exactly.

610 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

Direct examination continued by Mr. Smith:

Q. Captain, where did you talk with this Lloyds surveyor? A. On the vessel.

Q. Whereabouts was the vessel then? A. On deck.

Q. Where was the vessel located, in Brisbane? A. She was located in South Brisbane.

Q. Will you tell us the substance of your conversations with him?

The Court: How is this material? How am I to consider this?

611 Mr. Smith: I simply want to show that Lloyd's had notice they were never going to be asked to put this vessel back in class.

The Court: That is conceded in this case.

Mr. Mount: Yes.

The Court: Because it is not disputed there was a tender of abandonment here. There was a tender of abandonment and the tender was rejected.

Mr. Smith: The only thing I want to show, your Honor, and I don't want to labor the case at all, is that at the time the survey report, on which Mr. Mount relies, was made in Sydney, Lloyds had been

612 given notice that the repairs which the Army had in hand were not intended to put the vessel back in class, and that Lloyds would never be asked to class this vessel again for insurance purposes, so that they didn't have the need to see to it that the estimates they made as to the cost of putting the vessel back into class be as carefully made or as accurately made as they would as if they were going to be asked to reclass this vessel for insurance purposes.

The Court: There is no evidence in the case, nor is there any contention made by anybody, as I understand it, that Lloyds were asked to put this vessel back in class.

Mr. Smith: No, there is a statement in this subsequent survey, upon which Mr. Mount relies, that the cost of restoring this vessel to class would be so many Australian pounds. Now it is my contention that it has some bearing upon the weight to be given that statement to show that at the time the Lloyds survey was drawn, the people that drew it knew that the vessel was never going to be put back into class.

The Court: That would be admissible and I would receive it.

Mr. Murphy: No, it would not.

614

The Court: I understand Mr. Mount to claim that the surveyors to whom this witness spoke were not the same surveyors who made the survey in Sydney.

Mr. Murphy: He is right on that, but will your Honor let me say something?

The Court: Is that your contention?

Mr. Mount: Our contention is that we, all the underwriting members who are respondents, did appappoint a surveyor for the survey in Sydney——

Mr. Smith: But you also——

Mr. Mount: Wait a minute. —and we are bound by the findings on that survey. That was a joint survey, agreed by all sides.

615

The Court: I understand that, but Mr. Smith wants to show that those surveyors, having participated on behalf of Lloyds in the Brisbane survey, knew that it was never intended to restore this vessel to class and that, therefore, that knowledge influenced their appraisal of the damage that had been sustained. In other words, their appraisal was based not upon a complete restoration of the vessel, but just upon an appraisal to make it seaworthy, so it would float,

Mr. Mount: Well, then, he must try to impugn the honesty of the survey which was made in Sydney, which says specifically——

The Court: That is his purpose, as I understand it.

Mr. Murphy: Not the honesty.

Mr. Smith: Not the honesty but the quality, and the weight to be given to it.

Mr. Murphy: The weight.

Mr. Mount: Yes.

The Court: That is a nice way of saying it.

Mr. Mount: And if necessary, I may have to call a witness to show that Lloyds Corporation, which is
617 a classification society and has agents all around the world, is called in on matters where they don't represent the underwriting members of Lloyds.

The Court: Apparently all that Mr. Smith wants to show is that the surveyor who participated for Lloyds in the Brisbane survey had previous knowledge that it was not intended to reclassify this vessel. That is all you want to show?

Mr. Smith: That is all I want to show, what I intend to show by this witness.

The Court: Do you make a concession on that?

Mr. Mount: No.

The Court: Maybe we can get that concession.

618 Mr. Mount: Nobody appeared for the underwriting members of Lloyds on the Brisbane survey.

Mr. Murphy: I would like to look into that very point. There are so many documents in this case, and so many cablegrams. I cannot be sure of what I am saying. Now——

The Court: Unless you can show, Mr. Smith, that knowledge was actually conveyed to the surveyor who participated in the Brisbane survey on behalf of the underwriters in this case, I am not going to allow this.

Mr. Smith: Let me be heard on that a moment. Lloyds Underwriters do appoint surveyors generally. By that, they appoint certain surveyors who are

authorized to act for them and who will normally be selected to represent them in certain areas. In other words, it is a sort of a general appointment.

Mr. Mount: No proof of that.

Mr. Smith: Do you agree with that?

Mr. Mount: No, I don't agree with that.

The Court: He doesn't agree to it.

Do you claim that the same surveyors participated in both surveys, or that they were present?

Mr. Smith. I claim that people who represented themselves to represent Lloyds, were informed prior to the Sydney survey that this vessel was never going to be restored to class, and they were never going to be asked to class this vessel for insurance purposes again. 620

The Court: I will let you show that. What weight it is going to have with reference to the underwriters I don't know.

Mr. Smith: It may have none. I just want to show it.

The Court. I will let you pursue that line of interrogation.

Mr. Smith. I don't think it is fair to say—this witness had a conversation with a person who represented himself as representing Lloyds, and I want the substance of that conversation. 621

Mr. Mount. Not these underwriters.

Mr. Murphy: Mr. Mount is testifying on that point.

The Court: We will ask the witness.

Did you have a conversation with someone who represented Lloyds?

The Witness: I had a conversation with Mr. North, who said he was a Lloyds surveyor.

The Court: Who did he tell you he represented in connection with this ship?

622 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

The Witness: He was interested in the Classification Society.

Mr. Mount: That is it. Perfectly clear.

The Court: He dosen't know he represented or acted on behalf of the surveyor——

Mr. Murphy: Of the underwriters.

The Witness: No.

Mr. Smith: Lloyds Classification Society.

The Witness: Yes.

Q. What was the substance of the conversation? A.
623 The substance was that I told him my instructions——

The Court: I don't think it is admissible now.

Mr. Smith: Well, the fact that the Classification Society was notified that it was not going to be put back into class is a fact which underwriters could very easily ascertain.

The Court: Yes, but unless it was brought to their attention, unless the surveyor who participated in Brisbane——

Mr. Smith: I think it is material.

The Court: I know it is material but you haven't
624 the proof. I am not ruling it out because of its immateriality. Objection sustained.

Q. Major, how would you characterize the work that was done on the *Portmar*? Was it work intended to restore the vessel to commercial operating condition in class? A. It was not, no.

Q. What were your orders with respect to the work you were to do in that connection? A. My orders were to do only what would permit the vessel to be operated in Australian waters during the war, minimum work to be required.

Q. How did you go about repairing the hull plating? A. Any holes in the hull were repaired by welding a patch over the hole.

The Court: Is there any dispute in this case but that this was just a patch-up job, was not a permanent job?

Mr. Mount: No, we don't dispute that.

The Court: You concede it was a patch-up job?

Mr. Mount: We concede some temporary repairs were made there.

The Court: And that the repairs were temporary—and that the nature of the repairs was temporary?

Mr. Mount: So far as we know. A good deal we 626
have heard this morning we have heard for the first time just as your Honor has.

Q. Major Haggett, based upon your experience in the reconditioning of vessels, have you formed an opinion as to whether or not the *Portmar* would have been worth repairing to the extent necessary to restore her to commercial operating condition in class at the time you were aboard her during this patch-up work, from the date you went aboard her in September until you completed the work? A. I would say, offhand, no.

The Court: On what fact do you base that 627
opinion?

The Witness: From the first fact that she was an old vessel, too slow.

The Court: Old? How old was it?

The Witness: I don't know the year she was built, your Honor, but it was about '21—after the first World War.

Mr. Murphy: That is in Libelant's Exhibit 1.

The Court: I am just testing the witness. You say it is slow. What made you say it was slow?

The Witness: Knowing that type of vessel, I know approximately what speed they usually make, around ten knots. I know, going down the coast

628 *Harold W. Haggett, for Respondent U. S. A.—Direct.*

from Brisbane to Sydney, we made about five knots with a fouled bottom.

The Court: What would the normal speed of a ship of that type be?

The Witness: About nine to ten knots, loaded, good condition.

The Court: On what other facts do you base that opinion?

The Witness: The fact of the amount of repair work to be undertaken to put the vessel in class, 629 renew plates, fittings, and things of that sort, renew houses.

The Court: What about that? What about the amount of repair work?

The Witness: Cost.

The Court: What about the cost?

The Witness: Well, I don't know what prices were on the coast, but the plates that were holed I assume would have to be renewed to put her back in class instead of being patched up. Her houses were badly wracked, and would have to be practically rebuilt—wooden houses. Boat deck would have to have been renewed; we covered it with canvas to 630 keep the rain out. The masts——

The Court: You mean as a business proposition you would feel unjustified, not warranted, from a business standpoint, in incurring the expense necessary to make the necessary repairs on this ship?

The Witness: Yes, sir.

The Court: (Continuing) When viewed in the light of the value of the ship after the repairs had been made.

The Witness: In view of the fact that when she was—if she was thoroughly repaired, she would still be an old and obsolete ship, too slow ship.

631

Cross examination by Mr. Murphy:

Q. You didn't mention anything about damage on the navigating bridge. Did you note any damage on the navigating bridge? A. Well, the wheelhouse was badly wracked.

Q. What do you mean by wracked? A. Out of line, the sheathing was pulled away, and the compasses were gone.

Q. By "gone" you mean, was there anything left of them at all? A. No, sir.

Q. Nothing left? A. No, sir.

Q. Did you see any evidence of what kind of damage had caused that? A. Why, the only evidence that I ever— 632
outside of bullet holes, was probably caused by concussion, but I don't know, I wasn't there.

Mr. Murphy: Nothing further, your Honor.

Cross examination by Mr. Mount:

Q. Captain, the replacement of plates and so forth, that you testified to, I understood from another witness those were from a scrap pile? A. Why, pieces, of course, I don't know where they actually came from. I understood they came from Evans-Bacon Shipyard scrap pile, that is, patches welded over the holes.

633

Q. Isn't it true that everything that you did— A. Practically.

Q. —in the way of temporary repairs— A. That is true.

Q. —was with material from the scrap pile? A. And we also took a lot of material from a Liberty ship that had been grounded at the mouth of the river and broken in two. We replaced a good part of the steel with that.

Q. She had become scrap? A. She was broken in two, when I saw her.

Q. During this time that temporary repairs were being made at Brisbane, did the Army have exclusive control of the vessel? A. Yes, sir.

Mr. Mount: That is all.

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By Mr. Murphy:

Q. May I ask one more question. Do you remember the name of that surveyor from Lloyds? A. Mr. North.

Q. N-o-r-t-h? A. I assume so.

Q. Do you remember his initials were James E.? A. I really don't.

Q. Was that scrap pile that you mentioned in Brisbane, that shipyard scrap pile? A. Yes, everything we got was——

Q. Was in Brisbane? A. (Continuing) Right in Bris-
635 bane.

Mr. Murphy: That is all, thank you.

(Witness excused.)

CHARLES B. YULE, called as a witness on behalf of the Respondent United States of America, being first duly sworn, testified as follows:

Direct examination by Mr. Smith:

Q. Will you state your address, Mr. Yule? A. 9300
636 Flower Avenue, Silver Springs, Maryland.

Q. Mr. Yule, are you a marine surveyor? A. Yes, sir.

Q. By whom are you now employed? A. Well, change the name too often. It is the Federal Maritime Board. It used to be the Maritime Commission.

Q. When did you first go with the Maritime Commission? A. In 1940.

Q. Will you state what assignment you had with the Maritime Commission and its successors from that date to the present time? A. Yes, sir, I was assigned to the Baltimore office in charge of all repairs of all American and Lend Lease ships. And then I went back to Washington on the 25th of June 1942 as Superintendent Engineer for the Division of Operations. And then I came up to New York as

local manager for Maintenance and Repair in 1937, and then I went back to Washington as technical adviser to the legal department. I am still there.

Q. You said 1937. You meant 1947, isn't that correct? A. 1947, yes.

Q. Will you tell us something of your training and experience prior to the time you joined the Maritime Commission? A. Yes, sir. I served my apprenticeship in the Fore River Shipyards, Bethlehem Steel now, 1914 to 1918. I went into the Navy and I came out after the first World War.

638

I got my chief engineer's license in 1921 and I served as chief engineer for seven years.

I was taken ashore and made Port Engineer for the company. That was in 1927. I stayed there until 1930 when I was appointed Resident Surveyor for the United States Salvage Association at Galveston. I stayed there until 1934. The depression came along; they closed the office.

I went to work as superintendent, outside superintendent for the Harrisburg Machine Works in Houston until 1937.

I then went back to sea with The Texas Company until 1940, and I came up here in 1940 and I have been here since.

639

Q. During the war years did you have any occasion to deal with vessels that had been torpedoed and stranded? A. Yes, sir; I had charge of the foreign repairs and salvage, which included—my part of it was the Mediterranean and Atlantic.

Q. Will you tell us something about your duties in that connection? A. We had engineers located all around the world, and if a ship got into trouble, if it was in my area, I would get a cable from the engineer in that area, and I would instruct him to go ahead and do what I thought was necessary to salvage the vessel, or sell her, or what I thought was the best.

Q. You would make the arrangement either to salvage the vessel or dispose of it? A. Yes.

Q. The salvage officer would report to you? A. No, the engineer reported to me.

Q. Did you at my request examine this survey report, Libelant's Exhibit 47? A. American Bureau—yes, sir. Oh, yes, sir, I did.

Q. Did you also examine some other material with with respect to the SS. *Portmar* that I furnished you? A. Yes. If I remember, you asked me to come up with an overall cost to bring the ship back to the States. Is that what you meant?

641 Q. I furnished you some information as to the position and location of the *Portmar* in Australia? A. Yes.

Q. Somewhere in 1942? A. Yes.

Q. Is that correct? A. Yes. When I first got into this *Portmar* case I was told the ship had been damaged by enemy action at Darwin, Australia, and I worked up an estimated cost to bring the ship to the States and repair her as she was before the damage.

Mr. Mount: Your Honor, we have a joint survey that was made.

The Court: Let us find out upon what facts he has based his estimate. Maybe he has based his estimate upon that joint survey, I don't know.

642 Mr. Mount: All right.

The Court: We will find out. That will be the next question, I assume.

Q. Mr. Yule, I ask you to assume that the SS. *Portmar*, having the characteristics shown in Libelant's Exhibit 1——

The Court: What do you want to do with this witness next? Do you want to prove by him an estimate——

Mr. Smith: Based upon the survey report of the American Bureau——

The Court: Give me a chance.

Mr. Smith: Surely.

The Court: You want to get from him his expert opinion on the cost of repairs based upon the condition of the ship as revealed by what?

Mr. Smith: By the American Bureau survey at Brisbane, which Captain Haggett has testified accorded with his recollection.

The Court: Ask him that question and save time. I don't like these hypothetical questions.

Q. In your opinion, Captain, what would be the cost of effecting the repairs on the SS. *Portmar* in the United States called for in the survey report, Libelant's Exhibit 47? 644

The Court: Assuming that the damages were as outlined in this survey, Libelant's Exhibit 47, what in your opinion would be the cost of bringing the vessel to a port on the West Coast of the United States and making the repairs of the damage that is contained in this survey of this ship?

The Witness: $234,825.

Q. That would be the cost of repairs, is that correct? A. That is correct.

The Court: Two hundred—— 645

The Witness: $234,825.

The Court: The witness has in his hand what appears to be an itemized statement showing how he arrived at that sum. Do you offer it in evidence?

Mr. Smith: I offer it in evidence.

The Court: I will receive it in evidence.

(Marked Respondents' Exhibit U.S.A. F in evidence.)

Q. Is that sum which you just stated the sum which it would cost to repair the vessel or the total of the sum that it would cost to repair the vessel and bring her to the States? A. Oh, no. If this is correct——

The Court: If what is correct? Let's see.

The Witness: If this survey is correct——

The Court: Referring to Libelant's Exhibit 47.

A. (Continuing) If that is the complete picture, the $234,825 would be what I estimate it would cost in the States, ten per cent one way or the other, to put the ship back in class. On top of that——

Q. Do you mean——

The Court: Wait. Let him finish.

647

A. On top of that you have got, if there were no facilities in Brisbane or Australia, or in that area, you would have to hire a tug. The tug hire would cost you approximately $1,500 a day, at a speed of five or six knots, from Brisbane to San Francisco, San Diego, or Seattle, and you have to send the ship, I mean the tug, back; or, if you brought the boat from the States, you still would have to send it over.

The Court: A round trip of a seagoing tug?

The Witness: That is right.

The Court: How many days' charge, approximately?

648 The Witness: I think it is 7,000 miles. I estimate it is 6,300 miles on the Great Circle, but at that time, during the submarine-airplane headaches, you would have to make a 700-mile detour to come up the South American Coast. So it would be about 7,000 miles at, oh, five knots.

Q. Have you estimated how long it would take? A. I think it was 59 days. I am not just——

Q. Are these pencil notes that you made? A. Oh, yes, this is mine.

Q. Do they refresh your recollection? A. That is right.

Q. How many days? A. 58 days. That is the tow days. Then there is 29 days light; a total of 87 days at $1,500 a day, is——

The Court: 29 days what?

The Witness: 89 days.

The Court: 29 days what?

The Witness: 89.

Mr. Mount: Light, without the tow.

The Witness: No, the round trip of the tug.

The Court: Going back alone?

The Witness: Bringing the ship home and going back.

The Court: Yes.

The Witness: At $1,500 a day would be $131,000. 650

Q. Would there be other expenses in towing the vessel back? A. Yes.

Q. What would they be? A. War risk insurance at that time, basing—as I understand it—on the stipulated price of the vessel, $688,000, would, at 1½ per cent war risk insurance, 1½ per cent marine risk, plus $5,000 P and I insurance, would bring that insurance up to about somewhere around $19,000, I think.

The Court: How much for the tug hire, did you figure that? How much would your tug hire figure?

The Witness: The tug hire is $131,000. 651

The Court: Your insurance, you figure, $19,000, $20,000, all right.

Q. Have you got an exact figure for the insurance? A. Sir?

Q. Have you got a figure for the insurance? A. I have it here but I can't find it.

The Court: Nineteen or twenty thousand. What other expenses?

The Witness: Now, you have a crew of 15 men which, regardless of which way you hire them, in Australia or the States, you have to bring them over and send them back, or you have to send them over

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and you have get to bring them back, that will run about $17,000, $18,000.

Q. Does that include subsistence for the men and their wages and so forth? A. That is right.

Q. What other expenses would be incurred? Do you have the installing of bridles and the like on the ship? A. Oh, yes, I forgot about that, and to get the ship ready you have got to put a couple of insurance hawsers aboard, inch and a quarter steel wire, and get a thousand or fifteen hundred fathoms of manila rope, 9-inch, which would, 653 roughly estimated, be around $3,000 to get her ready.

Q. Are there any other expenses that would be incurred in getting her from Australia to the United States? A. No, I think——

The Court: What is the sum total of this?

Mr. Smith: There is one other item I want to discuss.

The Court: Excuse me.

Q. I asked you to assume that the vessel was sunk in Darwin and raised by the use of centrifugal pumps, and then towed around from Darwin back to Brisbane by two 654 tugs and a riding crew of salvors. I ask you whether you have made any estimate of the cost of doing that work.

Mr. Mount: Your Honor, I object to that question. I know there has been no evidence of any bill or charge by the people who did that towing.

The Court: I think we are getting a little far afield on that.

Mr. Mount: I object to the question.

The Court: Yes, all right.

Mr. Smith: The work was done.

The Court: I know, but this witness doesn't know the conditions at the time. He is an expert in what it would cost to bring the ship over and what it would

cost to make repairs here, or on the West Coast. He is not an expert as to what the reasonable charge would be for the perilous trip around the Cape, bringing it in. He doesn't know anything about that —at least I don't think he does. Do you?

The Witness: No, I will go along with you on that. I mean—excuse me.

The Court: That is all right. We understand each other. You are right.

The Witness: After all——

The Court: You don't know "from nothing" about that part of the world. 656

Q. What is the total of the towage and repair expense?

The Court: Let us get the towage separately. What would it cost to bring that ship over?

The Witness: It would cost you about $170,000 to deliver the ship in the States.

Q. What is the total of the two? A. Four hundred—you mean repairing and bringing her? About $470,000.

Q. Are you sure of that?

The Court: He is off on his figures but it is a matter of mathematics. 657

The Court: No, it is $235,000 plus $170,000.

Q. About four hundred——

The Court: Four hundred and five thousand, four hundred and ten thousand.

The Witness: $453,000.

Mr. Murphy: What did he say?

The Witness: $453,000.

The Court: What items make up that four hundred and fifty. Just give us the sum total, Mr. Witness, of the large items.

The Witness: The towage, $131,000; repairs, $235,000—oh, I forgot this one, 76 days at $11,400 for the crew.

658 The Court: You told us that, about seventeen or eighteen thousand.

The Witness: $6,750 for return transportation, $5,000—oh, $18,600 for insurance, $3,000 to get her ready, and the total is $171,060. That is not including the towage. The towage is $131,000.

Q. Have you had any experience in arranging for salvage of vessels stranded in areas subject to enemy attack? A. Well, my——

659 Mr. Mount: Your Honor, I haven't made many objections because I wanted all the facts it was possible to get before you, but I think this——

The Court: Let us see what experience he has had. Maybe he will tell us he has had none. We will find out. Let him answer.

Mr. Mount: It is in Australia.

The Court: We will find out.

The Witness: No, not in Australia.

The Court: Not in the southwest Pacific?

The Witness: No, sir.

Mr. Smith: Leave it out.

660 The Court: Forget it.

Mr. Smith: That is all.

Mr. Murphy: I just want to ask one question.

Cross examination by Mr. Murphy:

Q. Your total estimate there did not include anything with respect to the cost of moving the ship from Port Darwin around to Brisbane? A. No, sir.

Q. You start at Brisbane? A. My estimate was directly from Port Darwin to San Francisco.

Q. Oh, directly from Port Darwin to San Francisco? A. You cannot make two jobs of it. You have——

Q. All right, Port Darwin to San Francisco? A. Yes, or Seattle.

Mr. Mount: I have just two questions.

Cross examination by Mr. Mount:

Q. You do know that labor was cheaper in Australia than in the United States in 1942? A. Yes, sir, and Mr. Zubach was our engineer out there, and he told me that—bad luck, of course, that materials had to be brought to Australia—you could get labor for ten cents a dozen, or something of that nature, but the over-all picture there wasn't too much different between the cost of an American job and an Australian job. You got a cheaper price on labor but your materials were higher. Where we paid eight or nine or ten dollars a day for a machinist in the States——

The Court: A what for a machinist?

The Witness: Not today. In 1942. You got them for eight or nine or ten dollars a day, but out in Australia you would get them for four dollars and a half. We paid 45 and 50 cents a pound for plating. Down there you would have to drag it all the way from the States to Australia and it would cost you a dollar a pound.

Q. You don't know about the actual repairs that were made to the *Portmar* in Australia? A. No, sir.

Q. And you heard Colonel Plant testify that they needed the *Portmar* so badly that they used her, after the repairs, on several voyages for the Army before she was sunk? A. That is right.

Mr. Smith: No further questions.

(Witness excused.)

Mr. Smith: I rest.

Mr. Murphy: Before Mr. Smith rests, if the Court please, I wish to ask him if he is going to put in any evidence of what the actual cash expenditures were——

Mr. Smith: I am sorry.

Mr. Murphy: —of towing the vessel from Port Darwin to Brisbane, because he has the information.

Mr. Smith: Mr. Davis, will you take the stand?

The Court: Maybe we will have a concession on that instead of a lot of testimony.

Mr. Smith: That is——

The Court: How much it cost to tow this——

Mr. Murphy: What was the actual cost?

The Court: —from Port Darwin to Brisbane? What is your figure? Show it to Mr. Mount. He might concede that you spent that much.

Mr. Mount: I don't.

Mr. Smith: Spent about 17,000 Australian pounds.

Mr. Murphy: 17,973 Australian pounds.

Mr. Mount: We have never heard of any bill being made or paid.

The Court: Show it to Mr. Mount. Maybe we can save time.

Mr. Mount: And we do know of a lot of work in other cases done by the Australian Government under reverse lend-lease.

Mr. Murphy: That is not evidence.

Mr. Mount: I know it isn't.

The Court: It isn't, and Mr. Mount doesn't mean it.

Mr. Mount: But I would like to have this proved.

Mr. Smith: This is the only thing we have on it.

The Court: Show it——

Mr. Smith: I think that we have proof what it was. I think that Mr. Yule could give an estimate of the cost, but if you don't think that that would be appropriate, we have——

The Court: We will have a stipulation that you spent so much and that it was a fair amount.

667

Mr. Mount: There is nothing that shows that there was any bill paid for towing from Port Darwin to Brisbane.

Mr. Smith: The situation is, Mr. Mount, the Army——

Mr. Murphy: If the Court please——

The Court: Everybody is talking. Can we get together on a stipulation?

Mr. Smith: I will state my understanding of the facts. If anybody wants to stipulate, that is fine.

The Court: Suppose we take a five-minute recess? We will go inside and see if we can stipulate the facts. If we cannot, we will come out and take testimony.

668

(The following occurred in chambers):

Mr. Smith: It is stipulated and agreed that the reasonable cost of the services and equipment furnished the *Portmar* by the Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130.

The Court: Is that agreeable, Mr. Murphy?

Mr. Murphy: It is, your Honor.

669

The Court: You agree?

Mr. Mount: Yes, that is agreed.

I do want something from you that was actually paid.

Mr. Smith: Yes, I will try to get it.

It is further stipulated and agreed that the saving effected by the owner during the period from February 19, 1942 until November 17, 1942, by reason of the breakdown of the *Portmar*, for charter purposes, was $92,220.

Mr. Murphy: For charter hire purposes.

Mr. Smith: For charter hire purposes.

Mr. Murphy: For purposes of charter hire was——

Mr. Smith: $92,220.

Mr. Murphy: That is agreed, your Honor.

The Court: I don't know how that will affect Mr. Mount.

Mr. Murphy: Only in so far as——

The Court: Only as he comes in as subrogee. Do you consent to that?

Mr. Mount: If Calmar Steamship says that is what was saved, that is good enough for me.

Mr. Groom: We say it.

The Court: And the Government rests?

Mr. Smith: Government rests.

The Court: We will now hear the underwriters.

Mr. Mount: We offer in evidence deposition of Roy J. M. Merrett, taken here in New York on July 26, 1949.

The Court: Who was Roy Merrett?

Mr. Mount: He was one of the Lloyds underwriters.

Mr. Murphy: As a matter of fact it appears he was the leading underwriter on this risk.

If the Court please, I press the objections which are recorded in this deposition. I also object, your Honor, to the testimony of Mr. Merrett, in so far as he estimates additional premium, on the following grounds, first, the provision for additional premium in the held covered clause does not apply to this case because there was no deviation or change of voyage within the meaning of the held covered clause and, therefore, no additional premium is due.

I further object to the receipt of Mr. Merrett's opinions on the ground that such opinions are not entitled to any weight because Mr. Merrett is the leading underwriter in this risk, is interested in the result of the case, and his opinions are based on hindsight rather than on the true test of the premium which would have been charged for a policy which

would have covered the passage from Port Darwin to Timor under the circumstances shown by this case.

The Court: That last objection seems to me to go to the weight.

Mr. Murphy: Yes, your Honor.

The Court: The weight of his testimony and the weight of his opinion. I am going to overrule your objection at this time and receive the deposition in evidence. If, after my consideration of the case and after reading the evidence and the depositions which were offered by you, I come to the conclusion that 674
your objection is well founded, I will indicate that in my opinion and will rule then and exclude these depositions, but at the present time your objection is overruled and they are received in evidence.

(Marked Respondent Underwriter's Exhibit 1 in evidence.)

Mr. Mount: We also offer in evidence the testimony given under commission to London, covering the testimony of Arthur James Whittall, covering the testimony given by Robert Hutchings Whittall, Noel R. Jenkins, Albert William Theoabold, Leslie Kingdon Sweet, George Christopher Bedwell, and Harold 675
M. Mummery, who are underwriters in the London market, on the question of additional premium if the Court holds there was a change of voyage and that the insurance was still in force.

Mr. Murphy: I object to the introduction of the testimony of the witnesses named by Mr. Mount, taken under commission to London, on the same grounds that I stated as the basis of my objection to the deposition of Mr. Merrett.

I also wish to point out that one of these witnesses is actually personally interested as an underwriter. I believe that was Mr.—his name I will point out in my brief. The others are all associated with

companies who are interested in the outcome of this case by reason of their participation in the insurance on the policies.

I stress the point that the held covered clause does not apply, and I reiterate my objections as stated in my opposition to Mr. Merrett's deposition.

The Court: My ruling on these depositions is the same as on the Merrett deposition. Your objection with respect to their interest in the outcome, at this time, goes to the weight given to their testimony rather than to its admissibility. I am going to 677 receive these depositions at this time. If I hold that the held covered clause is not applicable to the facts in this case, I will indicate it in my decision and will exclude these depositions.

(Marked Respondent Underwriters' Exhibit 2.)

Mr. Murphy: I now offer in evidence—will you permit me—since you have offered only the direct—I offer in evidence the answers of these same witnesses, taken under commission to London, to cross-interrogatories propounded by proctors for libelant.

Mr. Hall: We offered it all.

678 Mr. Murphy: I didn't understand you did.

Mr. Hall: We offered it all.

Mr. Murphy: In that event my offer is not necessary.

The Court: You have only two witnesses to produce?

Mr. Mount: I have three witnesses. Perhaps I ought to explain to your Honor that I am calling these three witnesses to show that this rider, the warranted free of capture, was a provision which was adopted in 1940 and was known in the market. My third witness is Mr. William D. Winter, who is the leading American authority on marine insurance, and who has written a standard book on marine

insurance, and I am going to ask him what was the understanding of that clause in the marine insurance market.

The Court: Well, as I indicated to you in your opening, I don't think this testimony should be considered by the Court unless I find an ambiguity present in the clause in the policy. If I find that the language used in this particular clause in the policy is clear and definite in terms and not ambiguous, I don't feel this testimony is admissible or will be accepted or will be considered by the Court.

Mr. Mount: You have to make the final decision. 680

The Court: I will take it now and I will also indicate in my decision as to whether or not I find this clause, free of capture clause, ambiguous or indefinite in terms. If I find it is not ambiguous or indefinite in its terms, I will not consider this testimony as to the intention of the underwriters and of the insured.

Mr. Mount: My three witnesses, of course, have no connection with this case.

The Court: All right, I will take it.

Mr. Mount: They all come——

The Court: I will take the testimony from these three witnesses, then, under that ruling. 681

Mr. Mount: They all come under subpoena. Are you willing to agree that Mather proffered this rider?

Mr. Murphy: I don't think much of your word "proffered." I am willing to agree that Mather took the regular outstanding American Institute of Marine Underwriters clauses then in effect and sent them to Stephens to be attached to the policy to be issued; and I am also going to show that they used those same clauses in many other risks which were placed by Mather through Stephens with Lloyds Underwriters at the same time, that those clauses were

familiar to Lloyds Underwriters, and I am also going to show——

The Court: Maybe it will be conceded.

Mr. Murphy: I think it may be. And I also point out that this form of insurance was required by the charter terms of the *Portmar*. Will you agree to those things?

Mr. Mount: You have already done that. You have put in Ogden's letter saying that they were satisfactory.

683 Mr. Murphy: All right. That will be my position.

The Court: So there is no dispute, is that agreed——

Mr. Murphy: Is that agreed?

The Court: —that this free of capture clause——

Mr. Murphy: Rider.

The Court: —rider, was a rider in common usage?

Mr. Mount: Yes.

The Court: And that its terms were familiar to the underwriters, is that correct?

Mr. Mount: Yes.

The Court: And that it had been used in other policies written by these same underwriters?

684 Mr. Mount: That I don't know.

Mr. Murphy: That is what Mr. Grotefend of Mather will testify if I call him, that he used the same clauses on many other war risks placed with Lloyds Underwriters.

The Court: Who is that in Mather's office?

Mr. Murphy: Grotefend.

Mr. Mount: Is he here in New York?

Mr. Murphy: He is in court today, and he will testify he used this same form of insurance in other war risks with Lloyds Underwriters through Stephens at the same time or the same period and that Lloyds were fully familiar with it. It is the

standard American Institute of Marine Underwriters clause.

The Court: Will it be necessary to call this man from Mather's, or will it be conceded that if he were so called, he would so testify?

Mr. Mount: I think maybe you had better put him on.

(The following occurred in the courtroom:)

Mr. Smith: May I have leave to substitute a photostat of this exhibit of Mr. Yule's? 686

The Court: Yes. What I was going to propose, as indicated before, at the close of the evidence, all sides will take their own exhibits and submit the exhibits, or photostats of them, at the time you submit your final briefs. I don't want to be entrusted with the care of the exhibits.

STANLEY DONALD LIVINGSTON, called as a witness on behalf of the respondent Underwriters, being first duly sworn, testified as follows: 687

Direct examination by Mr. Mount:

Q. Mr. Livingston, what is your present position? A. I am secretary of the American Marine Hull Insurance Syndicate.

Q. How long have you been secretary of the Syndicate? A. I would say about five years.

Q. Will you describe what the American Marine Hull Insurance Syndicate is? A. The Syndicate is an organization of about eighty companies at present, which were banded together to form a strong and adequate American market for the insurance of vessels.

688 *S. D. Livingston, for Respondent Underwriters—Direct.*

Q. Do those companies act as a unit in accepting insurance? A. Yes, they do.

Q. You have appeared today as a result of a subpoena? A. Yes, sir.

Q. Are Mendes & Mount attorneys for the Syndicate? A. Not that I know of.

Q. In the Syndicate, I suppose, you have several committees? A. We have numerous standing committees and special committees.

Q. Is one of those committees the Policy Forms Committee?
689 A. Yes.

Q. In reply to the subpoena *duces tecum* that was served on you, have you—by the way, who was the secretary of the Syndicate in 1940? A. Mr. Norman S. Adams, since deceased.

Q. Was he secretary in both 1939 and 1940? A. Yes.

Q. In response to the subpoena have you produced a letter from Mr. D. C. Anderson, to your Policy Forms Committee, dated January 12, 1940? A. Yes, I have it with me.

Q. You have it there? A. Yes.

Mr. Mount: I should like to offer that letter in
690 evidence. It deals with the clause——

The Court: Deals with the what?

Mr. Mount: It deals with the rider which is involved in the policies in suit here—at least the words.

The Court: What particular rider?

Mr. Mount: The rider which starts "Notwithstanding anything to the contrary contained in this policy"——

The Court: That is the "free of capture" rider?

Mr. Mount: The free of capture rider.

Mr. Murphy: I have no objection.

Mr. Mount: I offer this letter in evidence.

Mr. Smith: I object to it as incompetent, irrelevant and immaterial.

Mr. Murphy: As to its materiality and relevancy I object, but I have no objection to the form of the proof.

The Court: I understand Mr. Smith has no objection to the form of the proof.

Mr. Smith: That is right.

The Court: But as to its materiality or its——

Mr. Mount: It is offered, your Honor, for the purpose of showing how the clause originated and that it was a market clause.

The Court: Yes. As I indicated to you gentlemen before, I will receive it in evidence. I don't know whether I will consider it or not in reaching my final determination. I will not consider it unless I find that it becomes necessary to inquire into the intent of the parties. 692

Mr. Mount: Right, correct.

(Marked Respondent Underwriters Exhibit 3.)

Q. Is that the original? A. No, it is a certified copy.

Mr. Mount: Is that satisfactory?

Mr. Smith: That is satisfactory. No objection to the form. 693

The Court: No objection as to its accuracy or as to the form of proof. The objection is as to its relevancy and materiality.

Mr. Murphy: If the Court please, I would like to add, subject to check as to the accuracy. I have just glanced over it.

Mr. Mount: That is understood.

The Court: If it is not accurate in substance, call it to Mr. Mount's attention and I know he will substitute a correct statement.

Q. Mr. Livingston, in response to the subpoena have you brought the minutes of the meeting of the managers of the Syndicate, meeting of January 18, 1940? A. I have brought

694 *S. D. Livingston, for Respondent Underwriters—Direct.*

an extract of those minutes dealing with the particular phase of the minutes——

Q. Have you the whole minutes there? A. I have them, if the Court would like to see them, but I would prefer not to leave the whole thing here. We have an extract that is certified. I took a deposition here, certified. Deponent states that the only pertinent parts of the minutes of that meeting relating to the f. c. and s. clause is the portion which has been given above in quotation.

Mr. Mount: I should like to show the whole
695 minutes to my opponents.

The Court: But you offer in evidence the extract?

Mr. Mount: I offer in evidence the extract.

The Court: And we will receive this. There is objection made as to its relevancy and materiality. The objections are overruled. The extract is received in evidence on the same ruling as applied to the preceding exhibits.

Mr. Murphy: I would like to add, if your Honor please, if I may, that the statement of the witness was that the minutes relates to the f. c. and s. clause. We are not now discussing the f. c. and s. clause.

696 The Court: Maybe the witness improperly described the clause. Instead of free of capture clause, he referred to it as free of capture and seizure.

Mr. Murphy: But there is a free of capture and seizure clause embodied in the basic form. This is a rider——

The Court: Is that what you intended, that these minutes refer to the rider?

The Witness: Yes.

The Court: Rather than the body of the policy?

The Witness: Yes.

Mr. Murphy: You don't mean f. c. and s. clause, as we conventionally understand it?

The Witness: No, the rider.

Mr. Murphy: You mean the rider——

The Witness: Rider that was used in connection with the f. c. and s. clause.

Mr. Murphy: Sometimes called the British capture clause.

The Witness: That is what I understand.

The Court: It is a modification we had in the Worthington case?

Mr. Murphy: No, sir, this rider was not involved in the Worthington case. The f. c. and s. clause was.

The Court: Off the record.

(Discussion off the record.) 698

Mr. Murphy: No objection to the form of proof, your Honor.

Mr. Smith: I have none, either.

Mr. Murphy: Reserving all other objection.

Mr. Smith: You have already noted our objections.

The Court: Yes, you object to its relevancy and materiality.

(Marked Respondent Underwriters' Exhibit 4.)

Mr. Mount: I hand you back the original. That is all, your Honor. 699

The Court: Any cross-examination?

Mr. Smith: None by the Government.

Mr. Murphy: None.

(Witness excused.)

The Court: Next witness.

Mr. Mount: I should have asked the witness if his Syndicate had any financial interest in this case.

Mr. Murphy: Conceded——

The Court: Conceded the Syndicate has no financial interest. Is that conceded?

Mr. Smith: Conceded.

Mr. Murphy: Conceded.

700 *Ernest G. Driver, for Respondent Underwriters—Direct.*

ERNEST G. DRIVER, called as a witness on behalf of the Respondent Underwriters being first duly sworn, testified as follows:

Direct examination by Mr. Mount:

Q. Mr. Driver, what is your present position? A. Secretary, American Institute of Marine Underwriters.

Q. Will you describe what that group is? A. The American Institute of Marine Underwriters is an organization—a membership association of marine underwriters
701 in the United States.

Q. Is it a voluntary organization? A. It is a voluntary organization, yes, sir.

Q. How many members has it? A. At the present time I would say approximately 135 members, company members.

Q. Are they all companies or some individuals? A. Companies are represented by individual underwriters. It is a part of the membership.

Q. In 1939 and 1940 were you secretary of the American Institute of Marine Underwriters? A. Yes, sir.

Q. You are here today as the result of a supboena? A.
702 Yes, sir.

Q. Are Mendes & Mount attorneys for the institute? A. No, sir.

Q. Has the institute any financial interest in this litigation? A. Not to my knowledge, sir.

Q. The Institute has several committees? A. Standing and special committees, yes, sir.

Q. Is one of those committees what you call the Forms and Clauses Committee? A. Yes, sir.

Q. What are the functions of that committee? A. From time to time it issues recommended forms and clauses for the use of its member companies. Recommended forms only.

Q. That is, recommended by that committee? A. That is right.

Q. When clauses are recommended by that committee, does the Institute publish those clauses? A. They are published, yes.

Q. By whom are they published? A. The printer is Joseph Lazard. I haven't his address but it is in New York City.

Q. He does all the printing of the clauses that are approved by the American Institute of Marine Underwriters? A. Recommended by the American Institute of Marine Underwriters, yes.

Q. He publishes a book, does he? A. Yes, he does. 704

Q. And in addition to the book does he have a reference by which the subscribers to the book are kept up to date with clauses subsequent to the publication of his book? A. That is my understanding, yes.

Q. In addition to the publishing in the book, is there any publicity which the Institute makes to its own members? A. Yes, by form of bulletin.

Q. In response to the supboena, have you produced a letter of July 18, 1940, to the members of the American Institute referring to the free of capture clause? A. I have that copy.

Q. Is this the original? A. There is no original. It is a copy. They are all copies of bulletins. 705

Q. Was this obtained from your own records? A. From my own records, yes, sir.

Mr. Mount: Your Honor, this refers to a free of capture clause which has to do with cargo and which is referred to in the minutes of the meeting where they did the same thing with respect to hull. The only reason for introducing it is because in the minutes of the meeting dealing with the hull, they refer to what had been done with respect to cargo. So that the thing needs that explanation.

The Court: I don't see its relevancy or materiality, even if there is an ambiguity, but I am not pre-

706 *Ernest G. Driver, for Respondent Underwriters—Direct.*

pared to finally pass on it at this time because I haven't studied the policy, and I haven't examined it or read the riders. So we will deem an objection made by the libelant and by the Government as to its reception because of its immateriality or irrelevancy. The objection is overruled at this time and I will receive it in evidence and if I determine to disregard it, I will comment on that in my final decision.

Mr. Mount: I offer this letter which has just been
707 referred to by the witness, in evidence, letter of July 18, 1940.

(Marked Respondent Underwriters Exhibit 5.)

Mr. Murphy: Will counsel supply us and the Government—

Mr. Mount: Yes.

Mr. Murphy: —with copies of these?

Q. Have you copies? A. I think I have a few extra copies.

The Court: Mr. Mount, I don't know whether
708 you were here when I indicated before that at the end of the trial each counsel will take his own exhibits and they will be made available by counsel for the inspection of other counsel, and the exhibits, not originals, but photostats, will be submitted by each counsel with the final briefs and proposed findings.

Mr. Murphy: Have you a copy of the one you put under Mr. Livingston's testimony?

Mr. Mount: If I haven't, I will get you one.

Q. Attached to this letter, Underwriters' Exhibit 5, there are some enclosures. Will you state what they are? A. They are referred to in the bulletin, sir. They are identified in that bulletin. If you wish me——

Q. They are identified in the bulletin? A. They are identified in the bulletin, yes, sir.

Mr. Mount: May the offer include the exhibits which are attached to the letter?

The Court: Yes, the circular letter and the exhibits are all received as one exhibit. Put a staple through them so they won't become separated.

Q. In response to the subpoena have you secured from your records copy of a letter of September 24, 1940, to members of the American Institute, Bulletin No. 1277? A. 710
I have that.

Q. This letter of September 24, 1940, to members, was signed by you? A. Yes, sir.

Q. And the enclosure with that letter has a number? A. It has a printed number, yes.

Q. What is that number? A. It is 87A68.

Q. What does that number signify? A. That is the number used by the printer for that particular form or clause.

Mr. Mount: I offer in evidence the letter and the enclosure. Part of the form which is enclosed is the very wording of the clause of the rider used in this 711
case?

Mr. Smith: The Government wishes to press an objection on the grounds of immateriality and irrelevancy, and especially to point out in this case that the clause is for use in connection with foreign hulls, and the hull involved in this suit was a U. S. flag hull.

Mr. Murphy: I join in that objection and I suggest to the Court that there ought to be no need of going around the barn in this way. If they have something that shows promulgation of this clause on American hulls, let us have it. I am sure they have.

712 *Ernest G. Driver, for Respondent Underwriters—Cross.*

There is no need of putting in clauses promulgated for cargo.

The Court: Just building up a little atmosphere.

The Mount: I just want to show this clause was a known clause in the market.

The Court: I am going to overrule the objections made with the same statement, I won't repeat it, that I made with respect to the other exhibits. I don't know whether I am going to consider any of them.

(Marked Respondent Underwriters' Exhibit 6.)

713 Mr. Mount: That is all.

Cross examination by Mr. Murphy:

Q. Mr. Driver, you are secretary of the American Institute of Marine Underwriters, am I correct in that? A. Correct, sir.

Q. I show you a policy of Lloyds London, marked in evidence here as Libelant's Exhibit 6. I will ask you to look at the form printed in black and white, headed "Calmar Steamship Corporation," which bears a clause printed in red ink on the left-hand margin, and which 714 is printed on both sides, and which on the back bears the notation at the very end, "American Institute," in capital letters, and then (hulls), in capitals, and then (July 1, 1941), and the letter F. Do you recognize that form? A. Not in that form I do not.

Q. I show you annexed to it a rider, printed on thin paper in blue ink, beginning with the words, "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free from claim arising from capture, seizure, arrest, restraint, detainment, requisition, nationalization, or condemnation," etc. At the foot it bears the letters B.C., and the figure 2 in Arabic. Do you recognize that? A. No, I don't.

(Witness excused.)

The Court: That was my interpretation as I read it. I don't see——

Mr. Murphy: For any damages by reason of the taking.

The Court: Of the taking, what I would call, as a layman, the condemnation of the ship.

The Witness: Well, now, that is——

Mr. Murphy: Pardon me, the condemnation——

The Witness: —is something else.

749 Q. The restraint or detainment? A. Restraint or detainment or capture, the physical taking of the boat.

Q. As a marine underwriter of your experience, will you state what was understood in the marine business by the last part of that clause beginning with "but unless"?

Mr. Murphy: Objection.

Mr. Smith: Objection.

The Court: Yes, you have your same objection. Same ruling.

A. During the war, to facilitate the movement of cargo, Great Britain and her Allies took vessels into control ports
750 in order to see whether they had contraband or other illegal cargo on them. The ship at that point, and the cargo, was in the control of the Government authorities, or it was captured. It left this—while going into those control ports, a very dangerous operation, because of lack of lights, mines, all sorts of things in the channels, the vessel was apt to be blown up or, because of the lack of lights, she was apt to go ashore, and be otherwise injured or destroyed.

The cases had been settled, that the underwriters were not liable. The underwriters didn't think that was doing their part of their job. So they constructed, first, the clause that is offered in evidence as the cargo clause, which is a little bit more specific because it was dealing with a single voyage, and then they constructed this clause to go on hull

policies, which might be either voyage policies or time policies, to show that they were willing, notwithstanding the fact that this vessel had been captured, nevertheless, if in entering a control port she was blown up by a mine, or if she went ashore by reason of faulty or other navigation, they would not refuse the claim because of that happening. It was to save the assured from something over which he had no control in a very limited situation, where the British Government had not captured it for the purpose of, at that point, condemning the boat because we say that if condemned, we were not liable, but for the purpose of finding 752
out whether the boat, perhaps, should be condemned, and the underwriters felt that under those circumstances it was their duty to go ahead with their assured and take care of this unusual situation. But it was always within the framework of that voyage, of that particular incident of the voyage. The words are general, I agree, in the hull policy. They are more specific in the cargo clause because they could be made a little bit more specific.

Mr. Smith: I ask that the answer——

The Court: That means that the cargo provision could be made more specific——

The Witness: Because it was—— 753

The Court: —but that the hull provision, you find, is sufficiently specific to carry out the purpose and the intent of the underwriters?

The Witness: Yes.

Mr. Smith: I ask that the answer be striken out as not responsive. We asked at the beginning that the question be directed to the meaning of the clause, not to the reason for its adoption, and the answer is a hundred per cent—an answer as to the reason why the underwriters adopted the clause and has nothing to do with the meaning of it.

The Court: I overrule your objections.

Mr. Murphy: I join in the objection.

The Court: The purpose of that cross examination, Mr. Murphy, would you state it for the record?

Mr. Murphy: Was to see if the secretary of the American Institute of Marine Underwriters recognized this print, which was extant and in the market, as being familiar to him and promulgated by his Syndicate. He said he doesn't recognize it.

WILLIAM D. WINTER, called as a witness on behalf of the respondent underwriters, being duly sworn, testified 716 as follows:

Direct examination by Mr. Mount:

Q. Mr. Winter, what is your present position? A. I am chairman of the board of the Atlantic Mutual Insurance Company and the Centennial Insurance Company.

Q. How long have you held that position? A. Since 1946.

Q. Is the Atlantic Mutual Insurance Company one of the small companies or one of the large companies? A. It is one of the leading companies in the marine insurance field. 717

Q. Has your company any financial interest in the outcome of this suit by Calmar against British underwriters? A. Not to the best of my knowledge and belief.

Q. Are you here today in response to a subpoena? A. I am, sir.

Q. Do Mendes & Mount represent your company? A. They do not.

Q. How long have you been engaged in the insurance business? A. 49½ years.

Q. Has that all been with the one company? A. Yes, sir, all with the Atlantic Mutual Insurance Company.

Q. Has that experience included underwriting risks? A. Yes, sir, since 1909.

Q. You have always been in the underwriting department? A. Yes, sir.

Q. When did you become an officer of the Atlantic Mutual Insurance Company? A. In April 1917.

Q. In your experience in underwriting have you insured both hulls and cargo or have you been limited to one class? A. Both hulls and cargo.

Q. Did you ever have any connection with the American Marine Insurance Syndicate? A. I did.

Q. What was that connection? A. For many years I was a manager of the Syndicate.

Q. Were you a manager in 1940? A. I was.

719 Q. Have you ever had any connection with the American Institute of Marine Underwriters? A. Yes, sir, I was director for many years and president of it for a while.

Q. Have you ever had any connection with the New York Board of Marine Underwriters? A. Yes, sir, I was a director of that and president for a period.

Q. Did you ever have any connection with the American Cargo War Risk Reinsurance Exchange? A. Yes, sir, I was chairman of that Exchange from its origin until May 1950—since 1939 to 1950.

Q. Will you please explain what that Exchange was? A. That Exchange was the American reinsurance market for war risk insurance on cargoes.

720 Q. Have you ever delivered courses and lectures on marine insurance? A. I have.

Q. Can you give us the details of that? A. Why I gave the first course in the United States at New York University in 1918; and following that I lectured at Columbia University and the College of the City of New York.

Q. Are you an author of books? A. I am.

Q. On marine insurance? A. I am.

Q. What book is your own on marine insurance? A. It is known as Marine Insurance by Winter.

The Court: Is it published now? I would like to see it.

The Witness: I would be very glad to send you a copy. You may have it.

The Court: No objection to my taking it and looking at it?

Mr. Murphy: Not the slightest, your Honor. It is a well known work.

Mr. Mount: Off the record.

(Discussion off the record.)

Q. That book is in its second edition, I believe? A. It is in its second edition and in the throes of its third edition. It is being reborn.

Q. Have you any idea how many copies have been sold? 722
A. Yes, in the 30 years in which it has been issued there have been upwards of twelve or thirteen thousand copies.

Q. In 1939 and 1940 were you active in hull insurance? A. I was.

Q. Did that include both marine and war risks? A. It did.

Q. Did you have any thing to do with rates, the fixing of rates? A. I did.

Q. In those years? A. Yes, sir, I did.

Q. Did you have anything to do with the passing on insurance clauses in those years? A. I was not a member of the committee that formulated the clauses but, as the 723
manager, I did pass on them for final approval.

Q. That is, manager f the Syndicate? A. Manager of the Syndicate.

Q. I show you a document which is entitled American Institute, October 1939, and in the upper righthand corner says 87A47. Can you identify that? A. This is the American Institute cargo free of British capture clause amended as of that date, as of October 1939.

Q. In your business as insurer did you keep in touch with the publications of the American Institute of Marine Underwriters? A. I did.

Q. Was the Atlantic Mutual Insurance Company a member of that Institute? A. They were and are.

724 *William D. Winter, for Respondent Underwriters—Direct.*

Q. I should have asked you, is this a free of capture clause? A. It is a free of British and Allied capture clause. It is not the f. c. & s. clause.

Q. And does it deal with cargo or hulls? A. This particular clause deals with cargo.

Mr. Mount: I offer this in evidence, with the same explanation, that it is referred to in the later discussion of the hull clauses.

The Court: I will take it, but, frankly, I don't see its relevancy, even by stretching my imagination. I
725 will take it.

Mr. Mount: I think your Honor will when you read the——

The Court: I will take it. I haven't read these minutes you introduced and, therefore, it may become material, but we will deem an objection made by the libelant and by the Government to its reception as being irrelevant and immaterial. I will overrule the objection and receive it in evidence at this time, with the same comment applicable to this exhibit as to the preceding exhibits.

(Marked Respondent Underwriters' Exhibit 7.)

726 Mr. Murphy: Will your Honor ask Mr. Driver to remain? I may want to recall Mr. Driver.

The Court: Yes, Mr. Driver will wait.

Q. In this document, which is a clause headed "American Institute Free of Capture Clause No. 3," and bears the number in the upper righthand corner 87A56— do you recognize that? A. This seems to be a different edition of the same clause. This is July 1940. I have forgotten what the date was on the one you showed me before. This also is a cargo clause.

Mr. Murphy: Cargo clause?

The Court: Yes, he says a later edition of the same cargo clause. I think the other was 1939.

The Witness: I think so.

Mr. Murphy: Same objection.

The Witness: And this is 1940.

The Court: Yes, we will deem the same objection made to this on the same grounds.

(Marked Respondent Underwriters' Exhibit 8.)

Q. Mr. Winter, were you present at a meeting of the managers of the Syndicate on July 18, 1940? A. July?

Q. On January 18, 1940. A. I was, at January 18, 1940. 728

Q. Yes, January 18, 1940. Have you a copy of those minutes? A. I have.

Q. Where did you get that copy? A. Out of my own company file.

Q. Do you know when you received those minutes? A. Why, it would have been within a day or two days following the holding of the meeting, just as quickly as the minutes could be produced.

The Court: Are these the minutes of which we have had extracts marked in evidence?

Mr. Mount: Yes, they are, and I was just going 729
to ask him if they are the same.

The Court: Show him the exhibit. What is it?

Q. I show you Underwriters' Exhibit No. 4. A. Well, it is in a little bit different typewriting. This is an extract, and I have the complete minutes.

Q. Is the extract, as far as it goes, in agreement with the copy that you have from your own records? A. Not taking the time of the Court to read it word by word, it is, if that is agreeable.

Q. And you were present at that meeting? A. I was.

Q. In those minutes appears the statement that the Policy Committee further reported a certain thing with

730 *William D. Winter, for Respondent Underwriters—Direct.*

respect to the British free of capture clause. A. Free of British capture.

Q. Free of British capture clause. Can you state whether there was that report submitted to the meeting and whether there was the action taken as is stated in the minutes of the meeting?

Mr. Murphy: Will you wait just a second, Mr. Winter?

Will you show me what you are pointing to?

Mr. Mount: Yes.

731 The Court: Why don't you ask him the simple question, does this exhibit fairly and accurately record the transactions had at that meeting.

Mr. Mount: And the discussions.

The Court: And the discussions.

Q. I will ask you that question. A. It does.

Q. From your experience and your knowledge of insurance, will you state what is understood in the insurance world by the first part of the clause which is quoted in those minutes down to the words "but unless"?

Mr. Murphy: If the Court please, I object to that
732 question on the ground that Mr. Winter has testified that he had nothing to do with the preparation of that clause or the drafting of it; that he was simply a manager of the Syndicate and had to pass on it and, therefore, he is not in a position to testify as to any intention that existed in the minds of the draftsmen.

Second, he is now being asked to testify to what the marine insurance world now understands——

Mr. Mount: Exactly.

Mr. Murphy:—as I understand it, and that, I submit, is irrelevant and immaterial.

The Court: It may become important to know how the marine insurance world interpreted this

clause both at the time it was adopted, first put into use, and after it was used, while it was being used at or about the time of the date of the policy in question in suit. That you may ask him. I deem an objection made to it, as to its materiality and its relevancy, and I will overrule the objection with the same observation that I have made as to the receipt of all these other exhibits——

Mr. Mount: I understand.

The Court: —which have been received in evidence. I don't think any of this testimony would 734
at all become important unless it became necessary to inquire into the intent of the parties.

Mr. Mount: The purpose——

The Court: The intent of the parties, as I see it, though, is best proved, not by what others thought, or how others acted with reference to a particular clause, but as to how they themselves acted and as to how they themselves thought concerning this clause. You cannot show the parties' intent by showing the intent of someone else on another transaction.

Mr. Mount: No, but, your Honor, the cases have held that marine insurance is a very technical subject
and that, in the event of any ambiguity or uncer- 735
tainty as to the meaning of the clauses, expert evidence from those who are familiar with the marine insurance——

The Court: I will take it, but I seriously question whether I am at all going to consider it. But before we take it, we might ask this expert witness, and I guess his expert qualifications are conceded.

Mr. Smith: Yes.

Mr. Murhpy: No doubt about it.

The Court: We will ask him a question as to whether or not he, on reading this clause, found it indefinite, uncertain or ambiguous.

Mr. Murphy: I would object to that question, your Honor.

The Court: Your objection is noted.

Mr. Murphy: Yes, your Honor.

The Court: It is overruled.

Do you find this clause, which you voted to adopt, I understand you voted to adopt, do you find it indefinite, uncertain or ambiguous?

The Witness: I do not.

The Court: Do you withdraw your objection, Mr. Murphy?

737 Mr. Murphy: I withdraw my objection in view of the witness's answer.

The Court: All right.

Have you ever found it indefinite, uncertain or ambiguous?

The Witness: No, because I know why it was written.

Mr. Mount: Well now, with the dispute raised by the other side, I would like to ask this witness what the understanding of the insurance market is.

738 Mr. Smith: Mr. Mount, do you contend that words of art are being used in this clause that are different from their customary and ordinary usage in the English language?

Mr. Mount: I say it is a combination of words which is not perfectly clear to those who are not engaged in the marine insurance business.

The Court: Not because of any words of art?

Mr. Mount: Not because of any words of art.

The Court: You claim, because of the phraseology——

Mr. Mount: Because of the phraseology——

The Court: —that one unfamiliar with the field would not know what it was all about?

Mr. Mount: Yes, sir.

Mr. Smith: All the words are used in their ordinary and customary sense, only the combination is art, is that the contention, Mr. Mount?

The Court: I would like to get your contention on this. Wherein do you assert—I would like to get it on the record—wherein do you assert that this clause is indefinite, uncertain or ambiguous?

Mr. Mount: I say that the words—the first half of the clause excludes capture, restraint, detainment, and so forth, and then there is a "but" followed immediately by, "unless the insured vessel is condemned, this warranty," that is, this exclusion, "shall not exclude losses otherwise covered by this policy," and I am endeavoring to show by an expert what is the meaning of those words, "losses otherwise covered by this policy". 740

The Court: Well, we will hear from Mr. Murphy who has been getting high blood pressure while you were talking.

Mr. Murphy: All I wanted to get in, your Honor, was that the last couple of questions of this expert witness have closed the door to all that sort of thing.

The Court: I am going to allow this question so that, after we have completed the trial, in case I should arrive at the point where this testimony would be helpful, I will have it in the record. 741

Mr. Smith: If your Honor please, just one——

The Court: I will indicate in my decision what consideration, if any, I gave to this testimony.

Mr. Smith: I think the witness should be directed to confine his answer to the meaning of the words in ordinary, common insurance parlance and not to the reason they were adopted. I think the reason that they are adopted is entirely immaterial.

Mr. Mount: I am perfectly willing to have that restriction.

742 *William D. Winter, for Respondent Underwriters—Direct.*

The Court: Are you an attorney, a member of the Bar?

The Witness: I have to admit I am. I have earned two dollars as a lawyer in my life. So you know how good I am.

The Court: I think your legal training must have come in very useful to you in your work, and you should not hesitate to admit you are a member of the Bar in good standing.

The Witness: I don't hesitate——

743 The Court: A subject of which you should be very proud.

The Witness: —to admit it, but I just didn't want you to draw an improper conclusion as to my experience. I earned two dollars within a week of my admission to the Bar and from that time on I have been an insurance man.

The Court: Let us get the answer to this question.

Now, you know what the question is? Objection is being made as to its relevancy and materiality and it is overruled.

744 The Witness: I don't know, your Honor, whether I can—I am not trying to take back the answer, but I was asked if I understood—if I thought this was unambiguous and, as a marine underwriter of long experience, I say it isn't to me, to a marine underwriter. Now, as a textbook writer, if I may, there are many clauses in the marine insurance business that to the layman are utterly ambiguous.

Now, with that, what question do you want me to answer?

By Mr. Mount:

The question was, will you state what the meaning in the insurance world was in 1940 and since then of the first part of the clause down to the words "but unless".

Mr. Murphy: I object again, your Honor, on the grounds——

The Court: Note your objection——

Mr. Smith: Same objection.

The Court: —Mr. Smith. The objection is overruled with the same comment that I have made continuously.

A. I want to make sure before I answer what—you say from the beginning——

The Court: Talking about the beginning of 746 the——

A. —words, "notwithstanding"——

Q. From the beginning down to the words "but unless".

Mr. Murphy: May I ask, are we dealing with the hull clause?

Mr. Mount: We are dealing with the hull clause.

A. Well, down to that point this clause frees the underwriters of any responsibility for capture, seizure, arrest, restraint, detainment, requisition, nationalization or condemnation by or under the authority of the Government of 747 Great Britain, France or its Allies.

The Court: If the Government of Great Britain or any of its Allies seize the ship——

The Witness: We are not liable.

The Court: —for governmental use you are not liable for the seizure?

The Witness: That is right.

The Court: But the insured has to look to the British Government, let us say, or the one who seized it for compensation, if they get any?

The Witness: I don't know who they are going to look to.

754 *William D. Winter, for Respondent Underwriters—Direct.*

The Court: The purpose of its adoption may bear upon what the parties intended to apply in construing it.

Q. I show you Libelant's Exhibit 6, which is one of the three similar policies which are in suit here. Will you note the voyage which is described in that policy? A. I have.

Q. Will you also note the held covered clause.

Mr. Murphy: It is at the foot of the war risk rider.

755

A. Yes, I have noted it.

Q. Will you please assume that the SS. *Portmar* was a registered U. S. single-screw, ocean-going steamship of approximately 8,600 tons deadweight——

Mr. Murphy: Just a minute. I don't like to interrupt, Mr. Mount, but we are heading into a hypothetical question on which he is going to ask this witness to decide a question which is for the Court alone, and we are wasting time.

The Court: He may ask this witness about the rates, the same as he asked the London underwriters.

756 I don't know what the purpose is.

Mr. Mount: I shall eventually. This one I wanted to ask was, under the facts which are alleged in the libel and stated by the master in his testimony, when the voyage which is described in the policy came to an end, according to the understanding of the insurance world.

The Court: He cannot testify as an expert on that matter. I in my——

Mr. Mount: You are the one.

The Court: I, in my humble field, with my very inadequate training and knowledge, am the expert on that.

Mr. Mount: You, of course, are the one to finally decide it.

The Court: So if you offer to prove that by this witness, I must sustain the objection.

Mr. Mount: May I state on the record that I would like to ask the witness——

The Court: Suppose we put the answer on the record, so that in case somebody is looking for it—but I don't see it. No, I am not going to allow it. No. Objection sustained and your offer of proof in that respect is rejected. 758

Mr. Mount: Will your Honor allow me an exception?

The Court: Yes, the law gives you an exception.

Mr. Mount: Now I want to ask the witness a question about the additional premium.

The Court: Yes, similar to the hypothetical question you put to the London underwriters?

Mr. Mount: Exactly.

By Mr. Mount:

Q. Will you please assume that the SS. *Portmar* was a registered U. S., single-screw, ocean cargo steamship of approximately 8600 tons deadweight, built in 1919, classed 100-A-1 with Lloyds Register of Shipping, and owned by Calmar Steamship Corporation; 759

Will you also assume that the SS. *Portmar* sailed from San Francisco on or about November 28, 1941, with cargo, bound for Manila in the Philippine Islands;

That the Japanese Government declared war on the United States on December 7, 1941, and thereupon invaded the Philippine Islands;

That on December 11, 1941, the SS. *Portmar* ceased following the voyage to Manila and proceeded to the Fiji Islands, thence to Sydney, Australia, arriving there on December 30, 1941, thence to Brisbane, where she discharged

760 *William D. Winter, for Respondent Underwriters—Direct.*

part of her cargo, and thence to Port Darwin, Australia, where she arrived January 19, 1941, and discharged the balance of her cargo, excepting about 2000 drums of gasoline——

The Court: That is January 1942, isn't it?
Mr. Mount: January 19, 1942, right. Thank you.

Q. (Continuing)—about 2000 drums of gasoline and then she proceeded to Wyndham, Australia, where she discharged the balance of her cargo;

761 Assume also that while she was at Port Darwin the assured's brokers, Mather, sent a cable to the London brokers, Stephens, in the form which I show you and which has been stipulated in evidence;

Will you also assume that Stephens, the London brokers, wrote to Mather in the form that I show you, a letter dated February 6, 1942;

Will you also assume that after all the outbound cargo of the SS. *Portmar* had been discharged at Wyndham, Australia, on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on or about February 12, 1942, and that she went to berth there

762 on or about February 13, 1942;

Will you also assume that the SS. *Portmar* was there loaded on February 13 and 14, 1942, with military equipment, stores, ammunition, field guns, and between 300 and 400 officers and men of the United States Field Artillery, and was ordered to proceed to Koepang at the western end of the Island of Timor on February 14 or 15, 1942, and sailed from Port Darwin for Koepang on February 15, 1942, and that the Port of Koepang had already been bombed by Japanese war planes;

Will you also assume that it is held by this Court that the policy of insurance, Plaintiff's Exhibit 6, covered the SS. *Portmar* beyond the time she sailed from Port Darwin to Koepang on February 15, 1942, and that such sailing was merely a deviation or change of voyage;

Can you state whether, assuming such holdings of the Court, additional premium would be due under the policy? Will you answer yes or no? A. Yes.

Q. What is the answer to that question? A. You mean payment of premium?

Q. Would additional premium be due? A. Would additional premium——

Mr. Murphy: Objection on the ground that——

The Court: I don't think it is within this witness's province. Objection sustained.

But assuming that an additional premium was 764
due, what in your opinion would be the fair amount of such additional premium?

I will deem an objection made as to its relevancy and materiality by both sides, and the objection is overruled, with the same comments that I have made with reference to the depositions of the London underwriters.

Mr. Smith: Except I ask to add an additional ground of objection, that the hypothetical question does not include many material factors bearing upon the case.

The Court: It doesn't, but let us not get too 765
technical. It would take two days to frame the question.

Mr. Mount: I will add anything you think should be added within the facts.

The Court: It would aggravate rather than minimize the situation, so you had better leave it the way it is.

What in your opinion, assuming that additional premium was due under such circumstances, what would be the fair and reasonable rate to have charged in the marine insurance field at that time?

The Witness: You want me to name a rate?

The Court: Yes.

766 *William D. Winter, for Respondent Underwriters—Direct.*

The Witness: In my considered opinion it would have to be at least 100 per cent.

The Court: That means you would not take the risk?

The Witness: Well, on the hypothetical question, I couldn't avoid it. It has been assumed that you ruled that I was on the risk, so I have got to name a rate under the held covered clause under your ruling. Now, it is uninsurable, to my mind. And the reason I say not less than a hundred per cent is that we might also not only have a total loss but have
767 sue and labor charges and maybe general average, and salvage charges which might run up the loss too much over the value of the insured thing.

The Court: In other words, if you could decline the risk under those circumstances you would decline to take it?

The Witness: Certainly would.

Q. And this answer that you have given is that what your judgment would have been in 1942, if you had known of the facts which I asked you to assume?

768 Mr. Murphy: I object to that on the ground that what would have been——

The Court: I thought I put it in my question.

Mr. Mount: I think you did, but I just wanted to be sure.

The Court: Objection overruled. It is the same.

The Witness: Now, will you state that question again?

Mr. Mount: Will you read the question?

(Question read.)

A. It would be.

Mr. Mount: That is all.

Cross examination by Mr. Smith:

Q. Do you know of any case in which a hundred per cent excess premium was charged? A. I cannot cite it to you, but there have been cases where—an uninsurable risk—in order to comply with the held covered clause, that amount has been charged.

Q. Under circumstances similar to those posed in the hypothetical question, to your knowledge, was any hundred per cent premium ever charged? A. I cannot quote you a case, no.

Q. The answer is you don't know of any? A. The 770
answer is I don't know of a case.

Mr. Murphy: No questions.

(Witness excused.)

The Court: Any further witnesses?

Mr. Mount: We have no further witnesses. I think we are ready to rest subject to the question of our asking Mr. Murphy to produce the judgment of the salvage suit in Australia that was sent to Calmar. I think it should be produced for whatever weight it may have.

Mr. Murphy: Pursuant to the call of counsel, I 771
produce from our file a copy of what purports to be the judgment of the High Court of Australia in admiralty jurisdiction, rendered November 19, 1943, in the case of United Salvage Proprietary, Ltd. and Williams against the ship *Portmar* and also the case of Salvage Board against Calmar Steamship Corporation, judgment being by Judge Starke.

Mr. Mount: Inasmuch as the underwriters here have been sued with respect to this salvage suit in Australia, which was defended by Calmar without prejudice to themselves or underwriters we offer in evidence this judgment which was furnished by Calmar's attorneys in Melbourne to Calmar, which is

part of the record of the suit, the judgment for which we are sought to be held.

The Court: I don't see how it is material in view of the concessions that have been made. You conceded that they paid 20-odd thousand dollars——

Mr. Mount: Yes.

The Court: —as a result of the salvage award to this man Williams.

Mr. Mount: Yes.

The Court: You have conceded that they ex-
773 pended a certain amount of monies in the defense of this suit and paid some solicitors in Australia. That amount has been proved. I don't remember how much that was. So how is this material?

Mr. Mount: There is one point in this judgment which I think is material. It shows that these two salvage claims, which have been made so much of by Calmar's attorneys, were parallel claims, one made by Williams, as his private company, and one made by the Government Salvage Department, of which Williams was just about that time made the head, and the Court found that Williams was doing his
774 work in his private capacity and not as the Government.

The Court: There doesn't seem to be any issue on that, Mr. Murphy says.

Mr. Mount: Will you concede that?

The Court: Wait a minute. Let us see if he doesn't.

Mr. Mount: He claims——

The Court: Mr. Murphy says, "There was a lot of expense incurred in salvaging this vessel, there were monies expended by Williams as an individual, there were monies expended by the Commonwealth. We only had to pay Williams, but Williams did not do all the work, and we were lucky to escape payment of the other bills submitted by the Commonwealth."

Mr. Mount: Oh, no, no. No, your Honor, this is a claim of pure salvage for raising the vessel, and, you see, that claim for raising the vessel was made by Williams as his private company and was made by the Australian Government of whose Department of Salvage Williams was appointed head just about that time, and the Court in this judgment pointed out—this is merely for raising the vessel—the Court pointed out——

The Court: I understand that, but maybe I don't get your point. 776

Mr. Mount: I get the point that there was a claim of 150,000 pounds——

Mr. Murphy: I dispute that.

Mr. Mount: —for salvage. It should go in.

Mr. Murphy: Two independent claims were asserted, for 100,000 pounds by the Government and 50,000 pounds by the United Salvage Proprietary and Williams, and they were both litigated together. They were separate and independent salvage claims.

Mr. Mount: Well, it was for the same service, and the Court said——

Mr. Murphy: You are arguing now. 777

Mr. Mount: —any award we give must go to Williams' private company because the Government was not at that time functioning, that is, the Salvage Department.

Mr. Murphy: Mr. Mount is testifying.

Mr. Mount: No, I am pointing out why I want to put this in. I simply want to meet the claim that there were claims for 150,000 Australian pounds.

Mr. Murphy: Yes, salvage claims.

Mr. Mount: For salvage.

The Court: You don't dispute claims were made against the ship for that amount?

Mr. Mount: But they were for the same work.

778 *William D. Winter, for Respondent Underwriters—Cross.*

Mr. Murphy: Well, the claims were made and litigated.

The Court: And you say this decision holds that it is for the same work?

Mr. Mount: Yes, and it says that it is dismissed as to the Government Salvage Department.

The Court: Are there findings of fact?

Mr. Murphy: There are, your Honor.

The Court: Reported findings of fact?

779 Mr. Murphy: Yes, there are many findings in that judgment.

The Court: Which are made an integral part of the judgment?

Mr. Murphy: Yes.

Mr. Mount: Yes.

The Court: On what theory do you say it is admissible in this suit?

Mr. Mount: Because Calmar was defending that suit for account of themselves and underwriters without prejudice, whichever should finally be held liable to pay the salvage award.

780 Mr. Murphy: That doesn't make it admissible.

The Court: In other words, you claim that although nominally the underwriters were not parties to this suit, actually there was a relationship between Calmar and the underwriters created by agreement?

Mr. Mount: Right.

The Court: Did it mention them as a party?

Mr. Mount: It had been agreed that Calmar should defend it without prejudice to who should be ultimately interested in paying the salvage award.

The Court: I will receive it in evidence. I overrule the objection of Mr. Murphy. I don't know what weight I will give it.

Mr. Murphy: I understand your Honor has overruled my objection——

The Court: Yes.

Mr. Murphy: —in objecting to the admissibility?

The Court: Yes.

Mr. Mount: That goes in as Underwriters' 9.

(Marked Respondent Underwriters' Exhibit 9.)

Mr. Mount: We rest.

The Court: I may determine to disregard this 782
entirely.

Mr. Mount: I understand.

The Court: If I do, I will indicate it in my opinion.

Mr. Murphy: I will ask Mr. Mount and Mr. Smith to stipulate that these three policies, Libelant's Exhibits 6, 7 and 8, were written on the American Institute of Marine Underwriters' basic form with riders attached to it current in the market and promulgated by the American Institute of Marine Underwriters through the American Syndicate.

Mr. Smith: I really don't know. 783

Mr. Murphy: And that the policies were issued on those terms.

Mr. Smith: I don't know the answer to that, your Honor. I will stipulate that the policy form was submitted to the Government and accepted by it as being in accordance with the obligation to take out a policy in that form, but I don't know whether it is in that form or not.

Mr. Mount: We will agree, just subject to checking.

The Court: All right.

784 *Clarence H. Grotefend, for Libelant—Direct.*

CLARENCE H. GROTEFEND, called as a witness on behalf of the libelant, in rebuttal, being duly sworn, testified as follows:

Direct examination by Mr. Murphy:

Q. Mr. Grotefend, where do you live? A. Elkins Park, Pennsylvania.

Q. What is your occupation? A. I have been with Mather & Company, insurance brokers, Philadelphia, 40 years.

785 Q. Were you concerned in the placement of war risk hull insurance on the SS. *Portmar* in late October and November 1941? A. Yes, sir.

Q. Through whom in London did you approach the underwriters for the placement of this insurance? A. Our London correspondent, Thomas Stephens & Sons, Ltd.

Q. Did you in your application for this insurance make any statement to Thomas Stephens & Sons, Ltd. as to the fact that the vessel was going to be used for trading on the insured voyage? A. No, sir, I made no statements as to what she would do.

Q. Did you inform Thomas Stephens & Sons, Ltd., that 786 the vessel was under charter to the Maritime Commission? A. Yes.

Q. I show you Libelant's Exhibits 6, 7 and 8. Do you recognize those policies? A. Yes, sir.

Q. Are those the policies which were sent to you by Thomas Stephens & Sons, Ltd.? A. They are.

Q. I will ask you to assume that all these policies are in the same form, and I show you Libelant's Exhibit 6, and ask you to look at the paper that is pasted on the outside folder, which is headed Calmar Steamship Corporation, which bears on the left a clause, printed in red ink, in the margin, and which on the back comes down to the words, "Attached to policy No. D41/11356 of Lloyds London."

Then the words, American Institute Time, the word "Time" being in capitals, and then parenthesis, the word "Hull" in capitals, close parenthesis, then the date in parenthesis, July 1, 1941, close parenthesis, and then the capital letter F. Did you send that paper to Thomas Stephens & Sons, Ltd.? A. Yes, sir.

Q. Where did you get it? A. Well, this particular paper——

Q. Yes. A. (Continuing)—was printed in our office printing department. This is a word-for-word copy of the American form, that it says there; also substantially a copy 788
of the syndicate policy in use at the time.

Q. You say "substantially." What do you mean by "substantially a copy of the syndicate policy"? A. Well, they would have other matter on there, such as names of subscribing companies, and so forth, but the conditions——

Q. But the insurance clauses and conditions are the same?

The Court: Answer; don't shake your head. A. Yes.

The Court: Are the insurance clauses and conditions the same?

The Witness: Yes.. 789

The Court: The only thing you omitted was the name of the company, the underwriter.

The Witness: That is right. We used then to fill in the name of the steamship company.

Q. Pasted to that American Time Hull form rider which you have just discussed, there are three pieces of paper of lightweight stock in blue typing. Did you send those three pieces of paper to Thomas Stephens & Sons, Ltd., to be included in the policy? A. Yes, sir.

Q. Where did you get those? A. Those also were printed in our office printing office but copied from the clauses which had been used on numerous occasions before.

Q. First of all, what was the source of those clauses? Where did your printing office get the clauses that are set forth on those three pieces of tissue? A. From the syndicate.

Q. Are those syndicate clauses? A. Yes, sir.

Q. Were those clauses outstanding and in use at the time you sent them to London? A. We received syndicate policies with such clauses on them.

Q. But I am first asking you, were those clauses set forth on those blue typed tissues that are pasted onto that
791 basic marine policy, were those regularly used clauses published in the American market by the syndicate at the time? A. Published——

The Court: Were those clauses currently being used in marine policies written by the syndicate at the time?

The Witness: Yes, sir.

Q. Did you or your office have anything to do with the draftsmanship of the language used in those clauses of the policy? A. No, sir.

Q. Are we to understand that in the case of the three
792 policies mentioned, Libelant's Exhibits 6, 7 and 8, you sent physically all the attachments, that is, the marine hull rider and the American Time Hull form and the tissue riders pasted onto it to Thomas Stephens & Sons, Ltd.? A. Yes, sir.

Q. For attachment to the policy? A. Yes, sir.

Q. And when the policies were returned to you, signed by Lloyds, the three papers you sent to Thomas Stephens were pasted onto the Lloyds' and the underwriters' and the Excess Insurance Company, Ltd.'s backing, base form? A. Yes.

Q. Is that right? A. That is correct.

Q. Did you use these same forms, American Time Hull forms and these blue typed tissues attached to them in any

other risk that you placed through Stephens with Lloyds' Underwriters and the English companies? A. Yes, for over a period of five years.

Q. Over a period of— A. 1940 to 1945.

Q. From 1940 to 1945? A. Yes.

Q. Some other risks were placed then before this *Portmar* risk was placed— A. Yes.

Q. —on the same forms? A. Yes.

Q. Have you anything in the file which shows a quotation of war risk insurance rates from American ports to Australian ports effective around the date of February 15, 794
1942? A. Yes, sir.

Q. Will you produce it, please?

Mr. Mount: Rates war risk or marine?

Q. (Continuing) War risk insurance rates, Mr. Grotefend. What is this paper, Mr. Grotefend? A. That is a circular issued by the American Marine Insurance Syndicate, publishing war risk rates at which they would accept war risk for the various trips that are shown thereon.

Q. Did your firm receive this paper in the regular course of business? A. Yes, sir.

795 Mr. Murphy: I offer it in evidence.

The Court: You offer this in evidence and you draw particular attention to——

Mr. Murphy: Two lines.

Mr. Mount: 28?

Mr. Murphy: Lines 27 and 28.

(Marked Libelant's Exhibit 54.)

The Court: By this you urge that the additional premium chargeable, if any, would be not more than 4½ per cent?

Mr. Murphy: 6½ per cent, your Honor.

If the Court please, I offer this in rebuttal to Mr. Mount's point about the additional premium, and

796 *Clarence H. Grotefend, for Libelant—Cross.*

subject to all my objections as to his contention about additional premium.

The Court: All right.

Mr. Murphy: Your witness.

Mr. Smith: The Government objects as to materiality only.

The Court: Objection overruled at this time.

Cross examination by Mr. Mount:

Q. You have no quotation of rates from Port Darwin to
797 Koepang on the Island of Timor? A. You mean on this sheet?

Q. On this sheet or from any other source. In other words, these were all rates from the United States? A. Well, I didn't make the rates, sir. There they are.

The Court: That is all you have?

The Witness: That is all I have, yes, sir.

Q. You have no rate from Australia to Timor Island or Koepang in the Island of Timor? A. This is all I have (indicating).

798 Mr. Smith: That is all.

(Witness excused.)

The Court: Do you rest, Mr. Murphy?

Mr. Murphy: Yes, your Honor.

The Court: Both sides rest?

Mr. Smith: I rest.

Mr. Mount: I do.

The Court: Your first briefs will be submitted February 15 together with proposed findings and conclusions of law, and at that time the exhibits, with the schedules that I mentioned during the trial will be submitted, and reply briefs, if any, will be submitted on March 1st.

799

Testimony Taken by Depositions.

Captain Axel Michelson—Libelant's Exhibit 26.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libellant,
against
UNITED STATES OF AMERICA, *et al.*, and EMORY S. LAND, Administrator, War Shipping Administration,
Respondents.

Ad. 129-295.

800

CALMAR STEAMSHIP CORPORATION,
Libellant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, and EDINBURGH ASSURANCE Co., Ltd., *et al.*,
Respondents.

Ad. 133-332.

801

Depositions on behalf of the libellant, taken pursuant to notice of taking deposition served on counsel for the respondents in Admiralty 133-332 on July 17, 1945, and similar notice served on counsel for the respondents in Admiralty No. 129-295 on the same date, at the office of Messrs. Kirlin, Campbell, Hickox & Keating, 120 Broadway, New York City, July 31, 1945.

Appearances:

Messrs. KIRLIN, CAMPBELL, HICKOX & KEATING (Mr. E. S. MURPHY and Mr. IRA CAMPBELL) for the libellant.

JOHN F. X. MCGOHEY, Esq., United States Attorney (Mr. WILLIAM E. COLLINS, Special Assistant) for the respondents in Admiralty 129-295.

Messrs. DUNCAN & MOUNT (Mr. RUSSELL T. MOUNT and Mr. HALL), for the respondents in Admiralty 133-
803 332.

Mr. C. L. GROOM also present.

OATH OF REPORTER.

I, FRANCES DECARO, the person before whom the depositions of Axel Michelson and Joseph E. Bullock in the above-entitled cause are scheduled to be taken, swear that, in so doing, I will comply fully with the provisions of Admiralty Rule XLIV of the United States District Court.

FRANCES DECARO.

804

Sworn to before me this
31st day of July, 1945.

HARRIET C. THIRKIELD,
(Notary Public stamp)

(SEAL)

It is stipulated that the testimony may be taken by a stenographer, signing being waived, stenographer's fees to be taxable.

It is further stipulated that any testimony taken from any witness either under direct or cross-examination by

any party may be offered by any party in either case above entitled.

Mr. Murphy: I wish to make a correction in libel in Admiralty 129-295. A typographical error appears in Article Twenty-third, the first line, where the word "respondent" should be "libellant". I ask the consent of counsel that this correction be made on the record.

Mr. Collins: No objection.

Mr. Murphy: The libel in Admiralty No. 129-295 was filed February 11, 1944. While the respondents have 806 appeared, no answer has yet been filed. I call upon counsel for the United States of America et al. to state upon the record the nature of the answer of the respondents to the libel in this suit.

Mr. Collins: On the basis of existing information, and reserving the right to supplement or change the outline of defenses as the evidence develops, the respondents will first move to dismiss unless the suit is discontinued against the individual respondents. The respondents will further contend that the Court has no jurisdiction of the subject matter of the action for the reason that at the times involved the steamship *Portmar* was a public vessel of the 807 United States.

As to the first cause of action which seeks charter hire from March 1, 1942 up to the date of the requisitioning of title to the *Portmar*, the respondents will contend that there is no liability for the reasons that as of March 1, 1942 the subject matter of the charter, namely the Portmar, had ceased to exist for the purposes of charter; further that the vessel was prevented by action of the military and naval authorities, British, Australian, and to a certain extent American, from performing her charter obligations.

As to the second cause of action the respondents will contend that there is no liability under a proper construction of the articles of the charter on which the libellant relies.

808 *Testimony Taken By Depositions.*

As to the third cause of action respondents deny any liability on the ground that there are no circumstances which under the terms of the charter make the respondents or any of them liable for the losses claimed.

Mr. Murphy: Is it stipulated that the United States requisitioned title to and possession of the *Portmar* on November 12, 1942 effective at Brisbane, Australia at noon November 17, 1942, Eastern Australian Time?

Mr. Collins: That is correct, subject to check.

Mr. Murphy: Mr. Mount, will you state the nature of
809 the answer of your clients in Admiralty No. 133-332?

Mr. Mount: In Admiralty No. 133-332 on behalf of the respondents I can state that the following is our anticipated defense:

1. The round trip voyage of the SS. *Portmar* from a United States Pacific port to port or ports in the Philippine Islands, whilst there and return to a United States port, covered by the respondents' policies, was abandoned and terminated at the very latest on discharge at Wyndham, Australia, February 9, 1942, of the last of the vessel's cargo which had been loaded on her in the United States.

2. The exclusive management, possession and control of
810 the SS. *Portmar* was taken over by the United States Army at least as early as February 10, 1942, at Wyndham, Australia, when the vessel, having there discharged the last of the cargo loaded on her in the United States, was converted from a commercial vessel engaged in trade to an Army transport, employed as a troop, munitions and supply transport, for the combat forces of the United States, and ordered by the United States Army to proceed with such troops, munitions and supplies from Port Darwin to Koepang, Timor, and into an active combat area. The nature of such military employment of the vessel and the nature of the risk to which she was subjected thereby were not within the coverage of the policies issued by the respondents.

3. The respondents are not liable under their policies for any damage sustained by the SS. *Portmar* as alleged in the libel, because such damage was occasioned by and arose from the willful and intentional exposure of the vessel to enemy action.

4. As a separate and partial defense by way of set off:

If the Court should hold the libellant entitled to any recovery against the respondents, such recovery should be reduced by the amount of additional premium provided for in the respondents' policies and to be determined by the Court. 812

5. As a separate defense to the libellant's first cause of action:

Under the provision of the respondents' policies reading—

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovery and repairing the vessel shall exceed the insured value."

there was not a Constructive Total Loss of the SS. *Portmar* under the respondents' policies, and the libellant's attempted abandonment on April 8, 1942, was invalid. 813

6. As a separate defense to the libellant's first cause of action, and irrespective of the preceding defense (No. 5), the actual situation with respect to the SS. *Portmar* on April 8, 1942, did not justify the attempted abandonment of the vessel to Underwriters under the High Probability Rule.

This statement of our defenses will of course not preclude us from additional defenses depending on developments coming out in the testimony, and further we are unable to state at the present time what our answers will be to the specific paragraphs of the libel which allege communications between the libellant's London brokers

814 *Deposition of Axel Michelson—Direct.*

and the respondents. We have written to London requesting copies of any communications which passed between libellant's London brokers and the respondents and when we get those we will let you know, Mr. Murphy, what our answer will be on those paragraphs.

Mr. Murphy: As to the reservations made by Mr. Mount and also by Mr. Collins, I wish to state that I shall take such objections as may be proper to any extensions of the answers which have been indicated this morning.

815

AXEL MICHELSON, being duly sworn and examined as a witness on behalf of the libellant, in accordance with the requirements of Rule XLIV of the United States District Court, testified as follows:

By Mr. Murphy:

Q. Where do you reside, Captain? A. Oakland, California.

Q. What is the street address? A. 4424 View Street.

Q. Are you an American citizen? A. Yes, sir.

816 Q. Since what date? A. I believe the 23rd of August 1916.

Q. Where were you born? A. Denmark.

Q. Are you a master mariner? A. Yes, sir.

Q. What license do you hold? A. Unlimited sail and steam, unlimited steam and motorships in the United States of America.

Q. How long have you held your Danish license as ship master? A. Unlimited Danish license since July 1909.

Q. And how long have you held your American ship master's license? A. Since 1920.

Q. How long have you been going to sea? A. Half a hundred years.

Q. In what kind of ships did you start your service at sea? A. Sailing ships.

Q. Did you ever serve in the engineroom at sea? A. No, sir.

Q. Always on deck? A. Yes, sir, always.

Q. How long have you been in the employ of Calmar Steamship Corporation? A. Since October 1927—I am not quite certain about that October.

Q. In what capacity did you enter the employ of Calmar Steamship Corporation? A. I was chief mate on one of the ships when Calmar took it over.

Q. Do your remember the name of that ship? A. *Massmar.*

818

Q. When did you first take command of a Calmar Steamship Corporation vessel? A. I made only one trip as chief mate—when I returned to the Atlantic Coast I was made master of the ship.

Q. Was that in 1927 or '28.? A. I believe that was into 1928.

Q. Have you served as master of various Calmar Steamship Corporation vessels since that time? A. Yes, sir.

Q. Have you been continuously in the employ of Calmar Steamship Corporation since that time? A. Yes, sir.

Q. On November 23, 1941 what was your position? A. I was master of the *Portmar.*

819

Q. Where was the *Portmar* on that date? A. She was in San Francisco Harbor.

Q. How long had you been master of the *Portmar* prior to that date? A. I am not quite certain—I believe about fourteen months—that may be a month either way.

Q. What kind of a ship was the *Portmar*? A. The *Portmar* was an ocean-going steamship.

Q. What was her deadweight capacity? A. 8600 tons.

Q. At what draft? A. At her summer draft, 24 feet.

Q. Was she twin screw or single screw? A. She was single screw.

Q. What kind of engines did she have? A. Triple expansion.

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Mr. Murphy: Is it stipulated that the particulars of the *Portmar* as alleged in Article Second in the libel, which are taken from Lloyd's, are correct, subject to check?

Mr. Mount: I am willing to stipulate it.

Mr. Collins: Yes, I will so stipulate.

Q. Who was your employer as master of that vessel? A. Calmar Steamship Corporation.

Q. Who paid your wages? A. Calmar Steamship Cor-
821 poration.

Q. Who paid the wages of the other officers and crew? A. Calmar Steamship Corporation.

Q. Who provisioned and supplied the vessel with all food and stores and equipment? A. The same.

Q. Who operated the vessel? A. Calmar Steamship Corporation.

Q. Would your answers be the same as of November 21, 1941? A. Yes.

Q. So far as you know, who owned the *Portmar* on November 21, 1941 and at all times material in this case up to November 17, 1942 at noon? A. Calmar Steamship Corporation.

822 Q. Was any charter of the *Portmar* made as of November 21, 1941? A. I don't know anything about the date. I understood that there was—that the ship was chartered by the United States Maritime Commission shortly before I left San Francisco.

Mr. Collins: I object and move to strike out the answer on the ground it is hearsay, and counsel knows it is inaccurate. I would be willing to stipulate subject to check that the vessel was under charter agreement, copy of which is attached to the libel in Admiralty No. 129-295.

Mr. Murphy: That is satisfactory.

Q. Did you receive a paper which purported to be a proposed copy of the charter of the *Portmar* to the United States Maritime Commission? A. Yes, sir.

Q. Was that before you sailed on the voyage? A. Yes, sir.

Mr. Murphy: I ask that a copy of the charter of the *Portmar* by Calmar Steamship Corporation to United States Maritime Commission as of November 21, 1941 be marked for identification as Libellant's Exhibit 1.

It is so marked. 824

Q. I show you a paper which purports to be a profile plan and deck lay-out and other particulars of the *Portmar* and ask you if you recognize that paper, that being a photostat copy? A. Yes, sir, that is the *Portmar*.

Mr. Murphy: I offer the plan of the *Portmar* for identification.

(It is marked Libellant's Exhibit 2 for identification.)

Q. What was the *Portmar* doing at San Francisco on November 21 and 23, 1941? A. I don't believe she was there on November 21st, I believe she arrived there either on the 22nd or 23rd. 825

Q. I stand corrected. What was she doing at San Francisco on November 23, 1941? A. She was loading for the Philippine Islands, first over in Oakland and later on at the Army Base in San Francisco.

Q. When did she finish loading? A. As near as I remember it was early in the morning of November 27th.

Q. What was the nature of this cargo that you mentioned? A. I don't know very much about the cargo. All I know about the cargo was what I observed when it was being loaded.

Q. From your observations what was the nature of the cargo? A. High octane gasoline was loaded in Oakland.

When we were over in San Francisco we started to load military equipment, supplies and ammunition.

Q. Did you have a detailed manifest of that cargo after the loading was completed? A. No, sir.

Q. Did you have any kind of a manifest to clear the ship outward? A. Yes, sir, I had a manifest that stated that the *Portmar* was loaded with so many pieces of Army supplies and equipment.

Q. Did it give any details? A. None whatever.

Q. On what date did the *Portmar* sail from San Fran-
827 cisco for Manila, Philippine Islands? A. November 28, 1941.

Mr. Mount: I have no objection if you want to look at the log books for dates.

Mr. Murphy: Counsel for the underwriters returns the deck logs of the *Portmar* which were supplied to Mr. Collins for inspection last week and which were forwarded by Mr. Collins to Mr. Mount.

Q. At the time the *Portmar* sailed from San Francisco did you know the particulars of the insurance which had been arranged by the owner for that vessel? A. No.

Q. At the time the *Portmar* sailed from San Francisco
828 was the *Portmar* seaworthy in all respects? A. Yes, sir.

Q. Was she fully manned, equipped and supplied? A. Yes, sir.

Q. Did you receive any sailing orders as to the voyage from San Francisco to Manila, Philippine Islands? A. Yes, sir.

Q. Whom did you get them from? A. I got them from the Naval Control officer in San Francisco, 12th Naval District.

Q. Were those orders written or oral? A. They were both.

Q. Both written and oral? A. Yes, sir.

Q. Have you got the written orders which were handed to you by the Naval Control officer at San Francisco? A. No, sir.

Q. What became of them? A. I turned them in to the British Naval Control in Suva, Fiji Islands.

Q. Do you remember generally what the written orders told you to do? A. Yes, sir.

Q. What was it? A. They stipulated my course from San Francisco lightvessel for Manila, mentioned a series of points that I had to pass through on my way out.

Q. What did the oral orders say? A. They were secret and I am not allowed to tell you. They were more or less an explanation of the written orders with some clarification and a few special orders. 830

Q. Did you receive any orders as to radio silence? A. Yes, sir.

Q. What was such order? A. That I was to keep radio silence after passing a certain point not very far from San Francisco.

Q. Are you permitted to say what that point was? A. No, sir, I don't believe I am permitted to say so.

Q. Is your reply based on the fact that those orders are secret? A. Yes, sir.

Q. Did you have any passengers on board the vessel when you sailed from San Francisco? A. Yes, sir.

Q. Who were they? A. Three staff sergeants.

Q. What was the function of those staff sergeants on 831 the vessel? A. I don't exactly know. First I thought they were just passengers for Manila. Later I found out that they were also a sort of cargo security officers or at least one of them.

Q. Did any of those three sergeants have any papers relating to the cargo? A. I didn't know so at the time of leaving San Francisco. I found out much later when we got to Australia that one of them had a complete manifest of all the cargo on board the ship.

Q. Did you follow out the orders which were given to you by the United States Navy prior to sailing? A. Yes, sir.

Q. Did anything occur which changed the orders which you received from the United States Navy at San Francisco as to the voyage you were to follow? A. Yes, sir.

Q. What was it? A. The Japanese attack on Pearl Harbor.

Q. What was the first word you had on that subject? A. I heard over the chief engineer's radio about the attack on Pearl Harbor.

Q. After that did you receive any order? A. Yes, sir.

Q. How did you receive it? A. Over the radio.

833 Q. What was the order and from whom did it come? A. It came from the Commandant of the 12th Naval District, San Francisco.

Q. What did it order you to do?

Mr. Collins: I object to that on the ground it is not the best evidence. At this point I will say that in response to the libellant's notice to produce I immediately endeavored to obtain from naval sources an exact copy of the radio message. So far it has not been obtained but it may be eventually obtained before these depositions are completed.

Mr. Murphy: On July 25, 1945 I served a notice
834 to produce on counsel for the United States in Admiralty No. 129-295 calling for production of the original wireless message sent by the Commandant of the 12th U. S. Naval District to the *Portmar* or to the master of the *Portmar* on or about December 11, 1941, with notice that on failure to produce the same secondary evidence of the contents would be offered.

Q. Captain, have you got the ship's copy of that radio message? A. No, sir.

Q. What became of it? A. I dare say that it was lost when the ship was lost at Darwin Harbor, February 19, 1942.

Q. Is that the extent of your knowledge as to the present whereabouts of the ship's copy of that message? A. Yes, sir.

Q. Will you therefore state your best recollection of what that radio message contained?

Mr. Collins: Same objection.

A. Yes, sir. It ordered the *Portmar* and three other ships mentioned by name—I knew the three of them, I had seen them in San Francisco Harbor before we left—it ordered the four of us to go into Suva Harbor in the Fiji Islands and receive further orders and instructions from the British Naval Control at Suva.

Q. Did you obey that order? A. Yes, sir. 836

Q. When did you arrive at Suva? You may refresh your recollection from your log or any other papers you wish to refer to. A. (Referring to log.) December 20th we anchored in Suva Harbor.

Q. Did you report to anyone on arrival at Suva? A. Yes, sir.

Q. Whom did you report to? A. I beg your pardon, I did not report because the man that I was to report to, he came aboard the ship, the British Naval Control officer, he came aboard the ship.

Q. When the British Naval Control officer came aboard the ship did you introduce yourself to him? A. Yes, sir. 837

Q. Do you remember his name? A. Yes, sir, his name was Commander Gray.

Q. Was anyone else present in your conversations with British Commander Gray? A. Yes, sir.

Q. Who was it? A. That was an American Naval Commander observer in the Fiji Islands for the U. S. Navy. His name was also Gray and his rank was also Commander.

Q. Well, we will call them British Commander Gray and American Commander Gray. A. That is right.

Q. Did you confer with both these officers? A. Yes, sir, both of them together, and separately with the American Commander Gray.

Q. Did you receive any orders from British Commander Gray at Suva? A. Yes, sir.

Q. What were those orders? A. To proceed to Sydney, Australia.

Q. Were those orders written or oral? A. Both written and oral.

Q. Have you the written orders which British Commander Gray handed you? A. No, sir.

Q. Where are they? A. I don't know, I turned them in to the British Naval Control officer when I arrived at Sydney.

Q. Was the American Commander Gray present when
839 the British Naval Control officer gave you your orders? A. Yes, sir.

Q. Did he concur in the orders which you were given?

Mr. Collins: I object to the form of the question.

A. Yes, sir.

Q. Did the American Commander Gray hand you anything in writing? A. No, sir.

Q. What did he say? A. He told me upon my questions that it was with the absolute knowledge and understanding of the American authorities that I received those orders from the British Naval Control officer.

840 Q. What were the contents of the written orders that you got from the British Naval Control officer at Suva? A. Directions as to how to proceed through a certain series of points to a point outside Sydney.

Q. Now, you said you got some oral orders from the British Commander Gray? A. Yes, sir.

Q. Was the American Commander Gray present when those oral orders were given? A. Yes, sir.

Q. Did he object to them in any way? A. No, sir.

Q. What were those oral orders that you got from the British Commander Gray? A. They were very much clarification of the written orders, and a few special orders.

Q. Are you able to say what those oral orders were? A. No, sir, they were secret.

Q. Did you follow the orders, written and oral, which you received from British Commander Gray at Suva? A. Yes, sir.

Q. While you were at Suva did you try to send a message to your owners, Calmar Steamship Corporation? A. Yes, sir.

Q. What did you do? A. I asked the two Commanders Gray about how to get a message sent to my owners in New York. I endeavored to get in touch with the American Consul but found out that I could not do it.

Q. Why not? A. I don't believe he was present in Suva 842
the day I was there.

Q. Were you able to send a message to your owner in New York? A. No, sir. They told me it could not be done, it was absolutely out of the question for security reasons.

Q. Did the orders given you by the British Naval Control officer at Suva contain any direction as to whom you should report to when you got to Sydney? A. Yes, sir.

Q. What did they say? A. Mr. Murphy, may I say a word here that I believe I should? I sent two letters from Suva when I found out that I could not send any cablegram.

Q. All right. Now about those letters: Whom did you send those letters to? A. Calmar Steamship Corporation.

Q. What were those letters? A. One was explaining 843
to them that I was in Suva Harbor and had been sent there on naval orders from American authorities and I mentioned also that I was to proceed further on, I did not dare to say where, on British naval orders that I would receive in Suva.

Q. And what was the other? A. One of the men came up and asked me if it would not be possible to increase his allowance that he had left his mother when we left San Francisco, and I told him that I could not do anything about it but I would write the Company a letter and ask them if they would voluntarily increase his allotment.

Q. Did you mail those letters yourself at Suva personally? A. No, sir.

Q. What did you do with them? A. I believe I gave them to one of the two Commanders Gray. There was a third letter also to my wife that was mailed at the same time.

Mr. Murphy: I wish to state on the record that search for these letters in the file of Calmar Steamship Corporation fails to reveal any trace of them. They were apparently never received in New York.

The Witness: Mr. Murphy, another thing that runs into my mind now, I have a copy of the articles
845 up in my hotel and at the time I sent this request for an increased allotment to that man—Steve was his name—I affixed a slip in my own handwriting to the articles.

Mr. Murphy: All right. I will state that if counsel wish us to produce the shipping articles containing the notation which the master has mentioned we will gladly do so.

Q. Now, you testified, I believe, that you were ordered by the British Naval Control officer at Suva to report to the Australian Naval Control officer on arrival at Sydney, is that right? A. Yes, sir.

846 Q. Did you follow the orders which you received from the British Naval Control officer at Suva? A. Yes, sir.

Q. When did you depart from Suva? You can look at any memoranda that you wish. A. On the 22nd in the morning.

Q. December 22, 1941? A. Yes, sir.

Q. When did you arrive at Sydney? A. December 30th anchored in Sydney Harbor.

Q. Did you report to anyone on arrival at Sydney? A. Yes, sir.

Q. To whom? A. First to the British Naval Control.

Q. You said British Naval Control officer—was it British or Australian at Sydney? A. Australian.

Q. What did you do with the written orders which you received from the British Commander Gray at Suva? A. I turned them in at Sydney.

Q. To whom? A. To the Australian Naval Control officer.

Q. Did you get a receipt for them? A. Yes, sir.

Q. What has become of that receipt? A. I don't know, it was lost at the time when the *Portmar* was sunk in Darwin Harbor.

Q. Did you receive any orders at Sydney from the Australian Naval Control officer? A. Yes, sir, they told 848
me how to proceed to Brisbane.

Q. Whom were you ordered to report to on arrival at Brisbane? A. The British Naval Control.

Q. British or Australian? A. Australian.

Q. Naval Control officer at Brisbane? A. Yes.

Q. Was anything said by the Australian Naval Control officer at Sydney about what would be done with your cargo at Brisbane? A. I am not quite certain.

Q. Were those orders written or oral? A. The orders I received from the naval authorities, they were always both written and oral.

Q. Have you the written orders now? A. No, sir.

Q. What did you do with those? A. They were taken 849
up at Brisbane when I arrived at Brisbane.

Q. Did you get a receipt for them? A. Yes, sir.

Q. Have you got that receipt? A. No, sir.

Q. Do you know where it is? A. No, sir, it went the same way as the rest.

Q. Did you see the American Consul at Sydney? A. Yes, sir.

Q. Did he come aboard your vessel? A. I am not quite certain.

Q. You may look at your log to refresh your recollection. On December 31, 1941 is there anything there which refreshes your recollection? A. (Referring to log.) Yes,

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sir, it says 4.15 in the afternoon U. S. Military Attache and Vice Consul aboard.

Q. Did you ask the Vice Consul anything about the orders you were getting from the Australian naval authorities? A. Not at that time when they were aboard ship. I asked the Consul when I was up at the Consulate.

Q. Did you go to the American Consulate on shore? A. Several times. I had to go there to enter and clear.

Q. When you were at the Consulate did you say anything to the Consul about the orders you were getting
851 from the Australian naval authorities? A. Yes, sir.

Q. What did you say? A. I wanted their assurance that it was with their——

Q. Answer the question, please. I asked what did you say to the American Consul. A. I asked "Is it with your full knowledge and approval that I am taking orders here time and again from Australian naval officers as to my route?

Q. And what did he say? A. He said yes.

Q. Did he say anything else? A. I don't remember his exact words. They were all trying to impress upon me that we had to work together and help one another as much as possible.

852 Q. Did he say that you were obliged to follow the orders of the Australian Naval Control? A. Yes, sir.

Q. Did you follow the orders which you received at Sydney from the Australian Naval Control? A. Yes, sir.

Q. When did you leave Sydney? You can look at your log. A. (Referring to log.) Left Sydney on Friday, January 2nd.

Q. What year? A. 1942.

Q. While you were at Sydney did you try to send a message to your owner as to where your vessel was? A. Yes, sir.

Q. What did you do? A. I tried through the Consulate and I tried through my agents, Dalgety & Company. I told the American Consul that I thought it was very important

that my owners should know that I was in Sydney and I asked him if it would be possible for him to see to it that a cablegram could be sent to my owners. I could tell by their attitude that they didn't.

Q. Did the Consul say whether he would send such a message? A. He said it was impossible, it could not be done for security reasons, there was no one of the commercial companies that would dare accept it and it would not pass the military censor and it would never get through.

Q. When did you arrive at Brisbane? A. (Referring to notebook.) January 4th late in the evening.

Q. Were you then at anchor or in berth? A. No, I anchored just off the town. 854

Q. When did you get into berth? A. The following morning, January 5th.

Q. Did you report to anyone on arrival at Brisbane? A. Yes.

Q. To whom? A. The same routine as in Suva and Sydney—I went through the British Naval Control.

Q. You said British Naval Control? A. Well, British more or less takes in Australian—sailors usually say British —well, it is Australian.

Q. Australian Naval Control officer at Brisbane? A. Yes, sir. 855

Q. What did you do with the written orders which you received from the Australian Naval Control officer at Sydney? A. They were taken up.

Q. By whom? A. By the Naval Control officer.

Q. At Brisbane? A. Yes, sir.

Q. Did you get a receipt for them? A. Yes, sir.

Q. What has become of that receipt? A. I don't know. It went the way of the others.

Q. What was done with regard to your cargo at Brisbane? A. The American military authorities at Brisbane took that in hand.

Q. What did they do with it? A. They discharged a large part of the cargo and put it on the dock, re-arranged

and put part of it back again. Also they put part of the cargo that had arrived in Brisbane on other American ships after it had been sorted and classified.

Q. Who did the stevedoring? A. That was Australian stevedores in the employ of the American Army.

Q. Did you have anything to do with the employment of the stevedores? A. No, sir.

Q. Did you make any effort at Brisbane to send a message to your owners as to where your ship was? A. Yes, sir.

Q. What did you do? A. I went through the same thing
857 as I had done in Sydney. I went and saw the American Consul—his name was Ragland, he was a little more sympathetic.

Q. Did the American Consul send a message for you to your owner? A. No, he finally told me that it could not be done but I believe that he made all efforts to get permission for me to send one.

Q. Did you ask your agents at Brisbane to try to send such a message? A. Yes, sir.

Q. Who were your agents at Brisbane? A. Dalgety also—they were my agents also at Sydney.

Q. Did you ask the Americal Consul at Brisbane
858 whether you should continue to follow the orders of the Australian naval authorities? A. Yes, sir.

Q. What did the American Consul say? A. He said yes, absolutely, he gave me several orders himself that proved to me that it was with the full knowledge of the American authorities that I was working under the Australian Naval Control.

Q. In the eighth article of the libel against the underwriters, and I believe in the corresponding article of the libel against the United States, it is alleged that a portion of the cargo was discharged designated by the Australian Naval Control officer at that port. In the light of your testimony do you wish to correct that? A. Yes, sir, I don't believe that the Australian Naval Control had anything to do with the cargo whatsoever. I don't see how that has come in there.

Q. Who was it that gave the orders as to the disposition of the cargo? A. Nothing but American officers.

Q. Did you receive any orders at Brisbane as to what to do after the cargo was re-loaded? A. Yes, sir.

Q. Who gave you those orders? A. The Americans. They told me that I was to go to Darwin with the cargo. The actual orders to go to Darwin and how to proceed in getting there was given to me by the Australian Naval Control officer.

Q. What did he order you to do? That is what did the Australian Naval Control officer order you to do? A. They ordered me to proceed to Darwin. 860

Q. Is that otherwise known as Port Darwin? A. Well, Darwin is a town—Port Darwin is a harbor. It is sometimes confused though.

Q. He ordered you to proceed to Darwin—and what about the cargo? A. I don't know that he mentioned the cargo at all. He probably did, I can't say.

Q. Did he order you to proceed to Darwin after you had the cargo on board re-loaded? A. Yes, sir.

Q. Did he order you to report to anybody on arrival at Darwin? A. Yes, sir.

Q. To whom did he order you to report? A. Australian Naval Control officer at Darwin. 861

Q. Were those orders written or oral? A. Written and oral.

Q. Can you give us the details of the written orders? A. They were just the same as the others I had received. They specified the route I was to take from Darwin and I was given a few oral explanations of how to act under certain conditions.

Q. Can you say what those oral orders were? A. No, sir.

Q. Were they secret? A. Yes, sir.

Q. Did you obey those orders? A. Yes, sir.

Q. On what date did you sail from Brisbane? A. (Referring to notebook) January 9th.

Q. 1942? A. Yes, sir.

Q. Did you proceed according to the orders you had received? A. Yes, sir, until I got as far as Torres Strait.

Q. What happened in the Torres Strait? A. I was ordered by signal to go into the harbor, Thursday Island.

Q. Did you follow that order? A. Yes, sir.

Q. What date did that happen? A. That was January 15th.

Q. When you got into harbor at Thursday Island what happened there? A. I found the American transport *Meiggs*
863 and the Matson Line *Mauna Loa* anchored in the harbor. The Australian Naval Control officer came up and told me that I was to wait with the two other ships until two Australian corvettes would arrive from the south and escort us from there on to Darwin.

Q. Were you ordered to proceed to Darwin from Thursday Island in convoy? A. Yes, sir.

Q. When did you depart from Thursday Island in convoy? A. That was the following day.

Q. What was the date? A. Friday, January 16th.

Q. When did you arrive at Port Darwin? A. Monday, January 19th.

Q. When you got to Port Darwin did you report to
864 anybody? A. Yes, sir.

Q. To whom? A. The Australian Naval Control officer.

Q. Did you surrender the written orders which you had received at Brisbane? A. Yes, sir, I did.

Q. Did you get a receipt? A. Yes, sir.

Q. What has become of that receipt? A. The same as the others.

Mr. Collins: You mean it went down with the ship?

Mr. Murphy: Well, I don't think the captain said it went down because the ship did not go down.

Mr. Collins: He said she was sunk.

Mr. Murphy: She was sunk but she did not go down, as we shall see.

Q. In order to clarify the record as to Mr. Collins' suggestion, Captain, what became of those receipts? A. I don't know. My quarters on the *Portmar* were blasted all to pieces. Most of my records and books and papers were blown all over the ship and all over the harbor.

Q. Did you receive any orders from the Australian Naval Control officer at Port Darwin as to what was to be done with the cargo on the *Portmar*? A. I believe he told me in a general way that the cargo was to be discharged at Darwin but he took me down to the American military headquarters and he introduced me to a Lieutenant Colonel 866
Jones who was in charge of the incoming cargo of American ships at Darwin.

Q. Did you receive any orders from Lieutenant Colonel Jones? A. Yes, sir.

Q. What did he order you to do? A. He told me that as soon as they could obtain a berth for me at the Darwin jetty I would have to go alongside the jetty and discharge the cargo.

Q. It is alleged in the eighth article of the libel against the underwriters and in a corresponding article in the libel against the United States that the Australian Naval Control officer ordered the *Portmar* to discharge the remainder 867
of the cargo at Port Darwin. Do you wish to correct that? A. Yes, sir, that is not quite correct because as to the actual disposal of the cargo I don't believe the Australian Naval Control had anything to do with it whatsoever.

Q. Who gave you the order for the discharge of the cargo? A. Lieutenant Colonel Jones.

Q. Of the United States Army? A. Yes, sir.

Q. At the time you got that order where was the *Portmar*? A. In Darwin Harbor.

Q. Was she at berth or at anchor? A. At anchor.

Q. How long did you lie at anchor? A. Until Saturday, January 31st.

Q. What were you doing while you lay at anchor, what were you waiting for? A. Waiting for a berth at the jetty.

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Q. What did you do on Saturday, January 31st? A. Docked the ship and began to discharge the cargo.

Q. Did you discharge all the cargo on board the *Portmar* at that berth? A. No, sir, not quite.

Q. What did you keep on board? A. About 1500 drums of gasoline.

Q. Who gave you the order to retain those drums on board? A. Colonel Jones.

Q. Again in the eighth article of the libel against the underwriters and the corresponding article of the libel
869 against the United States it is alleged that it was the Australian Naval Control that directed you to retain this gasoline on board. Do you wish to correct that? A. Yes, sir. I was down getting some charts at the Australian Control office and Lieutenant Gollar, he was the Naval Control officer——

Q. He was the Australian Naval Control officer? A. Yes, sir—he says "Captain, I believe you got to get in touch with Colonel Jones as soon as possible, there is a change in things and I believe they are going to send you over to West Australia with gasoline".

Q. Did you go to see Colonel Jones? A. Yes, sir.

870 Q. Did you see anyone else in the American service there? A. I did. On the way down to see Colonel Jones I went up and saw the American naval observer, Commander U. S. Navy Collins.

Q. What did you say to Commander Collins? A. I told him that I did not like to be ordered about by foreign naval authorities. I told him that sending a ship as big and heavy as the *Portmar* to Western Australia when there were several small British and Australian ships in the harbor that were much better fitted for the voyage than the *Portmar* was was not the right thing to do.

Q. What did he say? A. Commander Collins told me that—his exact words I don't remember but he brought out the same as the other Americans had done, that it was necessary that we all cooperate and do the best we could

because the situation was desperate and things had to be done and they had to be done as quick as possible and the *Portmar* was the handiest ship to send at the present moment.

Q. What did you do then? A. I went down to Colonel Jones for further orders.

Q. What orders did he give you? A. He told me that he had received orders that 2000 drums of gasoline was going to be sent to Wyndham, Western Australia.

Q. What did he tell you to do? A. They had just shortly beforehand found out that there was only 1500 or about 1500 left in the ship so it would be necessary to re-load a certain amount to make up the full 2000 drums. 872

Q. Pursuant to that order did you re-load 500 drums? A. I don't know the exact amount. We loaded until we had 2000.

Q. While you were at Port Darwin did you note a protest before any authority there? A. Yes, sir.

Q. I show you a paper and ask you if that is a copy of the protest which you noted? A. Yes, sir, that is the one.

Q. Have you the original of that? A. No, sir, the original was kept by the notary, I take it.

873

Mr. Murphy: I offer this protest for identification as Libellant's Exhibit 3.

It is so marked.

Q. There is some handwriting on the back of this paper, Libellant's Exhibit 3 for identification. Is that in your handwriting? A. Yes, sir, I wanted the seal, I had never seen a protest without a seal on it and he wouldn't give me any so he explained to me that it was just as good without the seal as it would be with a seal. I just made a notation in case people should ask me about it later on.

Q. Do you remember whether you mailed the original of that protest to anybody? A. No, sir, I did not because

I didn't have any mailing privileges anyway, they wouldn't let me send anything in the mail, they told me that there was no such thing as mail at Darwin.

Q. Did I understand you to say that the original remained in the possession of the notary? A. Yes, sir.

Q. Mr. Nichols at Port Darwin? A. I forget his name—(referring to Exhibit 3) yes, sir.

Q. How did this paper get back to New York? A. It was sent home with the chief mate.

Q. Who discharged the cargo of the *Portmar* at Port
875 Darwin? A. Australian stevedores working for the American Army.

Q. Did you employ them? A. No, sir.

Q. While you were at Port Darwin did you endeavor to send any message to your owner as to where your ship was and where she was going? A. Yes, sir.

Q. What did you do? A. I went and saw the commanding officer, Colonel Robinson. When first we arrived he was Robinson. I believe he was, in fact I know that he was relieved before we had been there very long, I don't know exactly when.

Q. All right, that is not important. What I want to get
876 at is what did you do to send a message to your owners about where your ship was and what she was doing? A. I asked him if they would send a message for me to my owners in New York.

Mr. Collins: Asked whom?

Q. Whom did you ask, Mr. Collins wants to know. A. I asked the commanding officer and afterwards several of the communication officers, their names I can't remember.

Q. American or Australian? A. American.

Q. What did they say? A. They said that it was absolutely impossible, any messages sent out of Darwin had to go by land line to Melbourne and the line they had couldn't take care of half of what they had to send and further-

877

more for security reasons I would never be allowed to sent it.

Q. Did you receive orders then to sail for Wyndham, Australia? A. Yes, sir.

Q. And whom did you get those orders from? A. I got them from the Australian Naval Control.

Q. And what instructions did you get from the Australian Naval Control officer as to what you were to do on arrival at Wyndham? A. I was to discharge the gasoline that I had on board and when I had so done to return to Darwin.

878

Q. Did the Australian Naval Control officer at Port Darwin order you to report to anybody on arrival at Wyndham? A. No, sir, I don't believe he did. I was told who to turn the gasoline over to.

Q. And who was that? A. That was a manager of a big slaughter house they had in Wyndham.

Q. Were the orders given to you at Port Darwin to go to Wyndham and return to Darwin? A. Yes, sir.

Q. Were they written or oral? A. Both written and oral.

Q. Were you given any instructions regarding any contact with the postmaster at Wyndham? A. No, sir. I believe it was mentioned that the postmaster at Wyndham, he was a representative of the Australian Navy there also, he was a police sergeant and postmaster, everything rolled into one.

879

Q. You received no orders regarding reporting to him, did you? A. No, sir—just a minute, I believe though that it was mentioned to me that he was the only public official there was in Wyndham.

Q. When did you sail from Port Darwin for Wyndham? A. That was February 4th.

Q. Were you ordered to proceed in convoy? A. Yes, sir.

Q. What was your escort? A. A little Australian corvette.

Q. Do you remember her name? A. I believe her name was the *Swan*.

Q. Did you arrive at Wyndham? A. Yes, sir.

Q. What date? A. Sunday, February 8th.

Q. What did you do there? A. The fellow that was going to see to the stevedoring of the gasoline and give me a receipt for the gasoline, he came aboard and they started to discharge the gasoline.

Q. Did you hire the stevedores to discharge the gasoline? A. No, sir, this was a complicated affair. I had been given
881. a pilot along to take me from Wyndham entrance and up to Wyndham. He was a Captain Gregory of Darwin. He had been entrusted by the American military authorities with hiring and paying the stevedores in Wyndham. I found out later on when I got to Wyndham that the population in Wyndham would not have anything to do with Captain Gregory whatsoever.

Q. Well, may we put it that the stevedoring was arranged by someone other than yourself, or did you finally have to arrange the stevedoring? A. I had to be in it anyway. I can't say that I——

Q. Well, just tell us what you did. A. I went and spoke
882. to the stevedores about this gasoline we had and I told them that they had a flying field a few miles away from the beach there they had no gasoline and that unless the gasoline was taken up there there wouldn't be much protection for them when the Japanese came and I told them that their likes or dislikes of Captain Gregory had nothing to do with the case whatsoever. I wanted to get the gasoline out of the ship and return to Darwin as soon as possible. They finally consented that they would discharge the gasoline if Captain Gregory was kept out of the picture as much as possible—they wouldn't have any personal doings with him.

Mr. Collins: It seems to me this is somewhat immaterial.

Mr. Murphy: Well, perhaps it is.

883

Q. Let us put it this way, Captain: Who paid for the stevedoring? A. I take it the American Army had given Captain Gregory money along to pay them.

Q. Let me put it this way: Did you pay for it? A. No, I did not pay for it.

Q. Did any agents of yours pay for it? A. No, sir, not unless you look upon Captain Gregory as——

Q. Well, was Captain Gregory the agent of your owner? A. He had helped me when I came to Darwin first, yes.

Q. Whose money did he use in paying for it? A. I don't know.

884

Q. Did you surrender your orders when you got to Wyndham? A. No, sir.

Q. What did you do after the cargo of gasoline was discharged at Wyndham? A. Returned to Darwin.

Q. What did you do there with the written orders which you received on departure from Port Darwin? A. Turned them back to the Australian Naval Control.

Q. Did you get a receipt for them? A. Yes, sir, I believe I did.

Q. Have you got that receipt now? A. No, sir.

Q. If you got a receipt what has become of it? A. It went the same as the rest of them.

885

Q. On what date did you sail from Wyndham back for Port Darwin? A. That was Tuesday, February 10th.

Q. And when did you arrive at Port Darwin? A. Thursday, February 12th.

Q. Did you come to anchor in Darwin or did you go right to a berth when you got back there? A. I anchored.

Q. Did anything occur at Port Darwin which required you to go anywhere else in the *Portmar*? A. Yes, sir.

Q. What was it? A. On the night between February 12th and February 13th the Australian Naval Control officer came out in the middle of the night and told me to be ready to dock the ship at daylight.

Q. Did you follow that order? A. Yes, sir.

Mr. Mount: Who was he?

Q. What was his name? A. Lieutenant Gollar.

Q. When did you berth? A. Early in the morning.

Q. Of February 13th? A. Yes, sir.

Q. Did you receive any instructions as to what was to be done with the ship? A. Yes, sir.

Q. What was it? A. I went up to see Colonel Jones and he told me that the commanding officer, he had given orders that four ships were to be sent from Darwin to Koepang on Timor Island with troops and military equipment and the *Portmar* was one of the selected ships.

887 Q. Did Colonel Jones give you any instructions about cargo to be loaded on board your ship? A. In a general way, yes. He told me that first all the stores, equipment and supplies would come aboard and finally the troops would be the last to arrive on board the ship.

Q. Was anything done about loading the *Portmar* on February 13th? A. Yes, we began loading.

Q. What did you load? A. Military stores, supplies and equipment, ammunition.

Q. Was there any materiel? A. Yes, there was also materiel.

Q. Were there any guns put on board the *Portmar*? A. Yes, sir, 75 calibre field guns of the 148th Field Artillery
888 was put on board.

Q. Were any personnel taken on board? A. Yes, sir.

Q. Did you finish the loading on the 13th of February? A. No, sir.

Q. Did you load on the 14th also? A. Yes, sir, we did.

Q. About how many men came aboard the vessel as passengers? A. I am not quite certain. I believe it was between three and four hundred.

Q. Officers and men? A. Officers and men, yes, sir.

Q. Did you receive any orders as to where you were to proceed with that cargo and how you were to proceed? A. Yes, sir.

Q. What were those orders and when did you get them? A. After all the cargo and the troops were loaded I received orders to go on board the American cruiser *Houston*.

Mr. Collins: May we ask from whom he got the orders?

Mr. Murphy: Yes.

Q. From whom did you get the orders to go aboard the *Houston*? A. I got the orders from the Australian Naval Control.

Q. Did you comply with that order and go on board the cruiser *Houston*? A. Yes, sir.

Q. Did you meet anyone there? A. Yes, sir.

Q. Who? A. I met the masters of the three other ships that with me was going to form the convoy. I met the 890
Australian Naval Control officer, Lieutenant Gollar and one of his officers. I met the commander of an American destroyer, either the *Preston* or the *Perry*, I forget which, and there was a couple of Australian commanding officers of Australian corvettes. Presiding at this meeting was Captain Rooks of the *Houston*.

Q. Were any orders given to you at that conference as to what you were to do? A. Yes, sir.

Q. What were the orders and who gave them? A. The orders were handed to each of us by Lieutenant Gollar. Then we sat down and Captain Rooks explained the orders to us and explained the procedure in getting to Koepang. 891

Q. Did you obey those orders? A. Yes, sir.

Q. What were the other ships in the convoy? A. The other ships in the convoy was an American transport *Meiggs*, the Matson liner *Mauna Loa*, the Australian motorship *Tulagi*, and the *Portmar*.

Q. And what was the military escort of the convoy? A. The U. S. Cruiser *Houston*, the U. S. Destroyers *Preston* and *Perry*, and I believe four Australian corvettes, one of them being the same one that had taken me to Wyndham a few days previous.

Q. When did the convoy set sail? A. Just after midnight on the 15th.

Q. Suppose you state the time, Captain. A. The time was 1.09 on the morning of February 15th.

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Q. Captain, it appears in the tenth article of the libel against the underwriters in this case that at 1.30 P. M. of February 15th the *Portmar* left Port Darwin in convoy as you have described. Do you wish to correct that? A. Yes, sir, that is not so.

Q. That should be 1.30 A. M. of February 15th? A. The exact facts are we hove up anchor and proceeded at 1.09, and at 1.30 we passed out through the boom gate.

Mr. Murphy: Then the libel is corrected accordingly and I take it that it is understood in this cor-
893 rection and in the other corrections noted this morning that I will move to conform the pleadings to the proof in the instances where the allegations are inaccurate.

Q. At 1.30 A. M. you passed through the boom gate, Captain? A. Yes, sir.

Q. Out into the Timor Sea? A. Yes, west through Clarence Strait and out into the Timor Sea.

Q. Did anything occur while crossing the Timor Sea which interrupted the voyage? A. Yes, sir.

Q. What was it? A. Around noon we were spotted by
894 two Japanese planes.

Q. Did those planes attack the convoy? A. Yes, sir, they attacked the convoy and we were ordered to disperse.

Q. Who ordered you to disperse? A. The commanding officer.

Q. Of what ship? A. Of the *Houston*.

Q. Was he the Commodore of the convoy? A. No, sir, he was the commanding officer of the convoy.

Q. Tell us what the Japanese planes did. A. The Japanese planes threw a few bombs at us and when they had no more bombs left they disappeared to the north.

Q. Did any of the bombs fall near the *Portmar* in that attack? A. No, sir.

Q. Was the *Portmar* damaged in any way in that attack? A. No, sir.

Q. Did the convoy re-assemble? A. Yes, sir, the convoy was ordered to form up again and we proceeded on our course to Koepang.

Q. Did you continue that voyage during the night of the 15th and 16th? A. Yes, sir.

Q. Did anything occur on February 16th which interrupted the voyage? A. Yes, sir.

Q. Tell us what happened on February 16th. A. There was a squadron of Japanese bombers came in from the north and attacked the convoy for about an hour. As soon as they were sighted the convoy was ordered to disperse. 896

Q. When did that attack begin? A. It says in the log-book from 11.20 to 12.15—fifty-five minutes.

Q. Now tell us what happened—you say the convoy was ordered to disperse? A. Yes, sir.

Q. Can you estimate the number of bombers that were in that attack squadron? A. There were 27—when first they came in they came in in formation. Later they spread out attacking the different ships in the convoy. The commanding officer of the troops aboard the *Portmar*, he had set up four machine guns, they were little Browning 30 calibre guns—two forward and two aft.

Q. Did the escort vessels put up any anti-aircraft fire? A. Yes, sir, they did. 897

Q. Were they sufficient to fight the Japs off? A. No, sir, it was not.

Q. Did any bombs fall near the *Portmar*? A. Yes, sir.

Q. Were you taking any precautions so to maneuver your vessel as to avoid the bombs? A. Yes, sir.

Q. What were you doing? A. I was trying to always keep my ship athwart of the course that the bombers coming in were steering so as to give them as little a target as possible.

Q. That is you were trying to present the beam of your ship to the line of the bombers' course rather than her full-length, is that right? A. Yes, sir, that's right.

Q. Now will you describe the fall of the bombs in your own words and according to your own recollection, the

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distance from the ship and the number of bombs that fell near the *Portmar* during that attack and what effect they had? A. I saw a plane coming in from astern over the *Portmar* and I saw her drop a bomb which fell just astern of the *Portmar*, it fell so close that it threw the water over the poop to mast height. I felt the engine racing and I thought we had lost the propeller. A little later on I felt the propeller taking hold of the water again so I knew that we had not lost the propeller.

Q. Where were you standing when you saw that bomb
899 fall aft of the *Portmar*? A. Navigating bridge.

Q. Which side? A. Port side of the bridge.

Q. Is that the open wing of the bridge? A. Yes, sir.

Q. Could you see aft along the port side of the ship? A. Yes, sir.

Q. Go ahead. A. A little later on I saw two more bombers coming in on the port quarter. They each let go a bomb but they hit the water at a considerable distance, say about half the length of the ship, from the port quarter of the *Portmar*.

Q. Did those bombs seem to do any damage to the *Portmar*? A. I could feel the concussion but I don't believe that the bombs did any harm to the ship.

900 Q. That is those two bombs? A. That is those two last ones.

Q. All right, go ahead, Captain. A. Then three more bombers came in from astern and they laid a stick of bombs alongside the port side of the ship parallel to the ship. They were only a very short distance away, they were only at the most twenty or thirty feet away from the ship's side.

Q. How many bombs in that stick that you mentioned? A. Six.

Mr. Collins: Excuse the interruption: You mean the bombs were twenty or thirty feet away, not the planes?

The Witness: Yes, sir.

901

Q. You mean they hit the water about twenty or thirty feet away from the port side of the ship? A. Yes, sir, in a line parallel to the side of the ship.

Q. Port side? A. Yes, sir.

Q. Tell us what the effect of those bombs was on the *Portmar.* A. They almost lifted the ship out of the water. They threw the water over the full length of the ship to mast height and I remember that I expected to see everything washed away from deck.

Q. Where were you standing at the time that happened? A. Port side of the bridge.

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Q. Were you out on the open wing of the bridge? A. Yes, sir.

Q. Could you feel any shaking of the vessel from the concussion of those bombs? A. Yes, sir, felt as if she had hit a rock.

Q. What did you do then? A. When I saw more bombers coming in it looked like they came in from the starboard quarter so I walked through the wheelhouse and out the starboard wing of the bridge. Just when I came out the starboard wing they laid a stick of another six along the starboard side. They were also parallel to the ship but they were possibly a little further off the ship's side than the ones I have just described on the port side.

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Q. About how far away were these starboard side bombs? A. Oh, I would say thirty or forty feet.

Q. All this time were you doing anything about maneuvering the vessel with respect to the course of the bombers? A. Yes, sir.

Q. Were you doing everything you could to keep the course of your ship across the course of the bombers? A. Yes, sir. The ship was slow in handling and slow in maneuvering and it wasn't always possible to get her athwart of their course.

Q. Were the bombers coming in from one direction or many directions? A. They were coming in from all directions, bombers all around.

904 Q. What was the effect of those bombs that fell off the starboard side of the *Portmar*? A. Well, again they deluged the ship with water from fore to aft and shook the ship very severely but I don't believe it was quite as much as the ones that had previously fallen on the port side.

Q. Did any more bombs fall near the *Portmar* after that? A. Yes, sir.

Q. Where? A. The next one fell forward.

Q. Where were you when the bombs fell forward? A. On the navigating bridge.

905 Q. Did you see the bombs coming down? A. Yes, sir.

Q. Did you form any judgment as to what those bombs were going to do when you saw them coming down through the air? A. Well, it always looks as if they are going to hit your ship.

Q. Where did they hit? A. This one hit just ahead of the stem of the ship.

Q. What was the effect of that on the vessel? A. It shook the vessel and threw water over the forward end of the ship.

Mr. Collins: You might ask him what he means by "just ahead".

906 Q. What do you mean by just ahead of the stem of the ship, Captain—can you estimate the distance? A. Well, that was 200 feet from me to the stem of the ship—I can't say.

Q. As it looked to you was it very close? A. As it looked to me it just cleared the stem—that may have been twenty feet off, I couldn't say.

Q. Was there another bomb that fell forward in that same area? You only described one bomb—was there another bomb that fell forward? A. No, sir, not that I remember.

Q. There was one bomb forward? A. There was one bomb forward, that was all I saw.

Q. Now, did any other bombs fall near the *Portmar*? A. Yes, sir, just as soon as this had happened I saw a plane coming from the port beam that swung up in the wake of the ship and dropped another stick of bombs alongside the starboard side of the ship.

Q. About how far away? A. Well, they were the furthest away of any of those three sticks—I would say they were over fifty feet away from the ship.

Q. And what did you observe as to the effect of that group of bombs off the starboard side of the ship? A. Well, I felt the concussion and I felt they shook the ship up but it was at least less than I had felt from the two other sticks 908 of bombs.

Q. During all this time did the military personnel on board the vessel maintain anti-aircraft fire with their machine guns? A. Yes, sir, they did.

Q. Was it effective? A. No, sir, there were only small machine guns and the bombers were at a considerable height and it seemed it had no effect whatsoever.

Q. In that last stick of bombs, how many was it that fell fifty feet off the starboard side of the ship? A. Six.

Q. Whenever you say stick you mean six? A. In this case.

Q. This morning I mean. A. They were so easily 909 counted because when the water churned up after the explosion of the bombs every second one was yellow and every second one was white—it was white, yellow, white, yellow, white, yellow.

Q. They were evenly spaced in that order? A. Evenly spaced in that order.

Q. So in this bombing attack we have three sticks of bombs, one on the port side and two on the starboard side? A. That's right.

Q. And one bomb forward? A. Yes, sir.

Q. Now, I call your attention to the fact that in a protest you later noted at Melbourne, Australia, which we will come to later on, you stated that after the first

stick of bombs fell on the starboard side that a little later you observed two bombs falling forward of the ship so close as to appear that they would inevitably hit the ship's bow, that such bombs fell just short of the bow dead ahead and the snip was again damaged with water from the explosions. Refreshing your recollection from that—do you wish to look at that to refresh your recollection—and I also call your attention that the same statement appears in your protest made before the United States Consul at Melbourne. In view of that do you wish to increase the
911 number of bombs which you observed to fall forward from one bomb to two bombs? A. There is but little doubt that at the time that protest was being extended I remembered better than I do now. Things have slipped my memory perhaps a little, not very much. It is barely possible that it was two instead of one.

Q. All right. Your present recollection is that there was one bomb? A. Yes, sir.

Q. But in March 1942 you entered protest and said that there were two bombs and that may be more accurate than your present recollection? A. I wouldn't dare to say not.

Q. Now, you have said that this attack terminated at
912 12.15 P. M. After that attack did you call for reports as to the condition of your vessel? A. Yes, sir.

Q. Whom did you call upon for reports? A. I was very much concerned about the state of the vessel and I asked the chief mate and the chief engineer to let me know what had happened to the ship in their respective departments.

Q. Did you observe anything yourself as you stood on the bridge about the condition of the vessel? A. I did.

Q. What did you observe? A. I observed the ship going full ahead, she did not have the natural vibrations that she always had had when I had been aboard her.

Q. Are we to understand that you found that the vibration of the ship had changed? A. Yes, sir.

Q. What did that indicate to you? A. Well, it indicated to me that she had been severely injured in her structure.

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Q. What reports did you get from your chief mate and chief engineer as to the condition of the ship? A. The chief mate was down in the hold and he told me that there were signs of paint and rust having broken loose from the side of the ship where the plates laid over the frames in No. 5 hold, No. 4 hold, in the shelterdeck and also in No. 3 hold forward of the bridge. The chief engineer said that he had noticed the same thing down in the engines. The chief also told me that——

Q. By chief you mean chief engineer? A. The chief engineer, yes, he also told me that when the first stick of six fell along the port side he had noticed that the pumps and auxiliaries in the engineroom had moved on their foundations and settled back again. He said that the port boiler showed signs of having moved in the saddle. The chief mate told me that he had had the carpenter sound the bilges and they had showed not much more water than he had had earlier in the morning when he had made soundings in the morning. The chief engineer told me also that he had observed a leak into the shaft alley from the afterpeak and that some of his bilge lines had been broken off.

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Q. Were those in the way of the port boiler, under the port boiler? A. He told me something about bilge lines under the port boiler, yes, sir; bilge line connections under the port boiler.

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Q. He reported to you that they were broken? A. They were broken or out of order so they could not be used.

Q. Did he report to you anything about the bilge line to No. 5 hold? A. Yes, sir, he did.

Q. What did he say about that? A. He reported that it had been fractured and he said that all over the ship the bilge lines were so full of paint and scale that it was not much good pumping before he had gotten them repaired. He immediately went to work repairing his bilge lines.

Q. Did he report that the paint and scale was paint and scale that had been shaken down by the vibration of the bombing? A. Yes, sir.

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Q. Did he report anything about the asbestos covering on the piping in the engineroom? A. Yes, he said all the asbestos in the engineroom had fallen off and I had occasion later on to look down in the engineroom and it looked like it had been a snow squall had been hitting everything down there, everything was white with asbestos that had fallen down.

Q. Did the chief engineer report that that had occurred when that port side stick of bombs fell close to the vessel? A. Yes, sir, he said most of it had been then.

917 Q. When those six bombs fell close to the port side? A. Yes, he said they had felt that more than they had felt the two sticks later on on the starboard side.

Q. Did the convoy resume course after that attack? A. Yes, sir, we got orders from the *Houston* to assemble again and form up in formation and we proceeded on our course to Koepang.

Q. Did you continue on that course very long? A. No, sir, about two hours afterwards the *Houston* sent signals that we were going to return to the port of departure.

Q. Did you proceed directly back to Port Darwin or did you go somewhere else first? A. No, sir, we steered a course more to the westward than the course for Darwin.

918 Q. Where did you meet up with the land? A. Down in Cambridge Gulf at the Wyndham entrance.

Q. And how did the convoy proceed from there? A. From there on we proceeded in shallow water all the way to Darwin.

Q. On what day did you arrive again at Port Darwin? A. On the 18th.

Q. At what time of day? A. That was about noon.

Q. Did you come to anchor or did you go to a pier? A. We went to anchor.

Q. And at what time did you anchor, Captain? A. I don't remember the exact time.

Q. You can check it from your log—February 18, 1942? A. (Referring to log) Let go starboard anchor 12.55.

Q. P. M.? A. Yes, sir.

Q. On February 18, 1942? A. Yes, sir.

Q. Who indicated the position at which you dropped that anchor? A. The Australian Naval Control officer told me where to anchor.

Q. And did you anchor where he told you? A. Yes, sir.

Recess taken to 2:30 P. M.

After Recess, 2:30 P. M. 920

Present as before.

AXEL MICHELSON resumes the stand.

Direct examination continued by Mr. Murphy:

Q. Captain, we were up to the point where you had come to anchor at a position directed by the Australian Naval Control officer at 12:55 P. M. February 18, 1942 in Darwin Harbor after returning from the Timor Sea. Have you the bearings of that anchored position? A. Yes, sir, I have the position and I have a couple of bearings. 921

Q. Will you read off what the bearings are from your notes? A. (Reading from notes.) The bearings from the anchorage were Fort Point Lighthouse bearing 42 degrees.

Q. Was that true? A. Always true.

Q. 42 degrees—distant how far? A. About 9200 feet—and Emery Point Lighthouse 342 degrees, 13,750 feet.

Q. 13,750 feet distant? A. Yes, sir.

Q. Will you lay those bearings on this chart? A. (Laying bearings on chart) Leaves the ship in a position 12, 29½ south and 130, 49½ east.

Q. Those are the readings of your anchored position, are they—the latitude and longitude? A. That is the position the ship was in from the bearings.

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Q. Will you plot that position on this chart? A. Yes. That should be it (marking chart).

Q. I will ink over the black pencil lines which you have drawn, making a cross with a leader marked "*Portmar* anchored 12:55 P. M. February 18, 1942". Did you report to the Australian Naval Control officer after arrival at anchorage at Port Darwin? A. No, sir, he come alongside the ship in a launch.

Q. Did you receive any orders from the Australian Naval Control officer on that occasion when he came alongside? A. No, sir, not direct orders. He told me that he would let me know as soon as possible what would be the next steps I would have to take.

923

Q. Did you later on get word as to where you were to go with all the troops and materiel on board your ship? A. Yes, sir, in the evening he come alongside the ship again in his launch and told me to dock the *Portmar* the next morning at daylight.

Q. Did you berth the vessel the next morning pursuant to that order? A. No, sir, just about daylight with the ship almost ready to move they came alongside again and told me to remain where I was until further orders.

924

Q. Did you remain there in accordance with that order? A. Yes, sir.

Q. Tell us what happened on the morning of February 19, 1942. A. Well, shortly after the launch had left there was a ship left the jetty—I forget which one it was, I believe it was either the *Meiggs* or the *Mauna Loa*—and his place, that we were to have taken, was taken up by an Australian mail steamer, the *Neptune*. She started to discharge cargo at the jetty.

Q. Then what happened to you and your vessel? A. I had told the chief engineer and the chief mate that I was fairly certain that the Japanese would attempt to get us in the harbor that day and I had told them to have everything ready to move at a moment's warning.

925

Q. Go ahead, in your own words tell us what occurred that morning. A. About 10 o'clock, I believe it was five minutes before 10, I was on the bridge—in fact I was on the bridge all the morning watching developments and seeing what was going on. A few minutes before 10 o'clock I could hear the roar of planes in the southwest and shortly afterwards I could see swarms of them in my binoculars coming in over the harbor.

Q. Did those planes attack the harbor and the vessels in the harbor? A. Yes sir.

926

Q. When they attacked was the *Portmar* at the same anchorage that you have plotted on this chart? A. Yes sir.

Q. How was the weather? A. The weather was fair, light airs.

Q. How was the visibility? A. Visibility was good.

Q. And where were you when you observed these aircraft coming in from the southwest over the harbor? A. On the navigating bridge.

Q. Which side? A. I believe I was on the port side.

927

Q. Now, from there on will you tell us how the attack developed and what occurred? A. I saw them coming over the ships in the harbor and going over the jetty to the town. I saw them let go their bombs when they went over the jetty and I saw a British steamer, British motorship, back out from one side of the jetty, she was afire, and she later on sunk in the harbor. Then I saw planes that had been up over town come back to the jetty and they let go bombs on the *Neptune* and I saw the *Neptune*, she blew up just as soon as the bombs hit, she was lifted clean out of the water and decks and everything in her came out of her and she turned over on her side and sunk alongside of the jetty. The next bombers went after the two American destroyers, the *Preston* and the *Perry*—they had remained in the harbor because they were out of fuel oil and they had to be fueled overnight. The *Houston*, she had left Darwin just as soon as she took us to the entrance the previous day.

The two destroyers when the bombers came in they were both at anchor. I saw them bomb the *Perry* and she blew up just like the *Neptune,* I could see her lifted clean out of the water and burst into a thousand pieces. Then they went after the *Preston* and the last I saw of the *Preston* she was blazing from the forward smokestack aft.

Q. Up to this time had there been any direct attack on the *Portmar*? A. No sir.

Q. How was the *Portmar* heading at that time lying at anchor? A. She was heading nearly south, maybe a point
929 either way of south, I cannot say for certain.

Q. Go ahead, what happened next? A. Next after they had blown the *Perry* up, set fire to the *Preston*——

Q. After they had blown the *Preston* up and set fire to the *Perry*? A. No, it was the other way, the *Perry* blew up.

Q. The *Perry* blew up and the *Preston* was set on fire? A. That's right. After the two destroyers were done away with they came up in the harbor bombing ship after ship. First they took the ships nearest to the shore.

Q. Let me ask you a question here: Was there any counter-aircraft at all, were there any aircraft in the air fighting those Japs? A. No sir.

930 Q. Did they have everything their own way? A. I never saw one.

Q. Was there ever any anti-aircraft fire? A. Very feeble. After the *Preston* and the *Perry* were done away with there was none of the ships in the harbor were armed or what they were armed with was just light machine guns like we had, that was all, no use against aircraft. They had a little anti-aircraft ashore but that was silenced in no time at all.

Q. Did the Japanese aircraft come after the *Portmar*? A. Yes, sir.

Q. Will you describe in as much detail as your recollection will permit the manner in which they attacked the *Portmar*? A. It seemed that it was fighters that came after us first. They would attack us from the east, come down

with the sun, machine gun us as they went across us. They would give us all their machine gun and cannon fire as they went over the ship and then they would swing back and come down on us again. It took a little time before the bombers came. There was a bomber dropped a bomb that I believe went through one of the lifeboats that were swung out on the port side—the lifeboat almost completely disappeared, and so did the lifeboat that was hanging ahead of it. This was the aft one they hit.

Q. Just a word about those lifeboats: Did you give the chief officer any order with respect to those lifeboats before this attack occurred? A. Yes, sir, as soon as I saw the Japanese coming I ordered him to lower all his lifeboats to the level of the maindeck. 932

Q. Where are those lifeboats regularly stowed on the *Portmar*? A. On the boat deck.

Q. Looking at Libellant's Exhibit 2 for identification, please indicate the boat deck? A. (Indicating) That is the boat deck.

Q. This deck here (indicating)? A. Yes.

Mr. Murphy: I will draw an arrow to that line and mark it "Boat deck".

933

Q. Is that correct? A. Yes—no sir, that is not correct, this is the deck (indicating).

Q. All right, the one above that? A. Yes.

Mr. Murphy: I will rub out the arrow and change it so that it points to the deck just under the words "Wireless house".

The Witness: That's right.

Mr. Murphy: And on that I have written "Boat deck".

Q. How many lifeboats did the Portmar carry? A. Four.

Q. How many on each side? A. Two on each side.

934 Q. So that the two lifeboats you are describing which were affected by this first bomb that dropped alongside the ship were those on which side? A. That was the aft boat on the port side.

Q. That was destroyed? A. It completely disappeared.

Q. And what happened to the forward lifeboat on the port side? A. The forward one on the port side was split in two parts along the keel from forward to aft.

Q. Did that bomb explode alongside the vessel? A. Yes, sir.

935 Q. At about what point alongside the vessel? A. Well, it must have been at or very close to the plating in the aft end of the engineroom in the port side.

Q. Suppose you mark on that chart about the point opposite which that bomb exploded, use the profile at the top.

(Witness marks the chart.)

Mr. Murphy: Witness makes a star.

The Witness: You will understand, gentlemen, that this is a profile from the starboard side and this thing happened on the opposite side, on the port side.

Mr. Murphy: Right.

936 Q. Now will you make a corresponding mark on the plan below which would show the point of that explosion viewed from above? A. Here is the engine-room, I would say about here (marking plan).

Q. Now, that mark you have just made, does that relate to the plan above it or the plan below it? A. Well, this is the line as far as that goes (indicating).

Q. Well, are you making the mark with relation to this plan or that plan (indicating)? A. The lower plan.

Q. That second mark I will put an arrow then—I will make one of your marks an arrow pointing to the lower plan? A. That's right.

Q. Is that mark supposed to illustrate the point of explosion of the bomb in the water alongside the vessel on the port side opposite the engineroom? A. Yes, sir.

Q. Now, this was the first bomb that was dropped that morning, was it? A. On the *Portmar*, yes, sir.

Mr. Murphy: I will put a leader "First bomb 2/19/42" and a corresponding mark "First bomb 2/19/42".

Q. Now, that is the first bomb. Now will you go on with your story and tell us what happened from there on? A. 938
A little later on they came along again. I was on the port wing of the bridge and they dropped a bomb only a few feet from the ship right abreast of the bridge.

Q. What side? A. On the port side also.

Q. A second bomb on the port side? A. Yes, sir.

Q. Now, will you likewise illustrate, using this lower plan or using the second plan down which will show the bridge—show us where the second bomb hit?

(Witness marks plan.)

Q. Is this second mark you have made supposed to relate to the plan below it? A. Yes, sir. 939

Q. It being on the port side? A. Yes, sir.

Mr. Murphy: Then I will mark this with an arrow pointing downward and also a leader marked "Second bomb 2/19/42".

Q. This second mark you have made for the second bomb is supposed to be in line with the navigating bridge throughout all these plans as they are laid out on this? A. Yes.

Q. But in the water on the port side below the navigating bridge? A. Yes, sir.

Mr. Collins: I don't think the witness has stated how far off the ship either bomb dropped.

940 Q. All right, Captain, will you in response to Mr. Collins' question tell us how far away from the side of the ship did the first bomb fall on the port side in the way of the engineroom? A. If the first bomb in the way of the engineroom went through the lifeboat and almost struck the deck it must have been less than twelve feet from the ship.

Q. You have put your answer in the form of a conclusion. Did you see the bomb fall in the water alongside the ship? A. Yes, sir, I did, I saw the explosion.

941 Q. You saw the explosion? A. Yes, sir.

Q. Did you see the column of water fly up? A. Yes, sir.

Q. How close to the ship was that column of water? A. Well, it was held back by the side of the ship because it was almost alongside the side of the ship.

Q. Now as to the second bomb you have indicated which fell in the way of the bridge on the port side, how close to the ship did that bomb fall? A. Less than twice as far away.

Q. Will you estimate that in feet? A. Say fifteen, twenty feet.

Q. Were any more bombs dropped on or near the *Portmar* in the attack of February 19, 1942? A. No, sir.

942 Q. Now will you describe the events as they followed after those bombs were dropped? A. We had a fire in No. 4 hold——

Q. Hold on a moment. I want to ask you a question about the chief officer. You testified that you ordered him to get the lifeboats swung out, right? A. Yes, sir.

Q. And you ordered the lifeboats lowered to the level of the maindeck? A. Yes, sir.

Q. Which is the maindeck on the *Portmar*? A. When I say the maindeck I mean the weatherdeck—the maindeck is really this one (indicating). I meant the weatherdeck.

Q. All right. Is this the deck that you speak of, this line (indicating on plan)? A. Yes, sir.

Mr. Murphy: I will put a leader and mark that "Maindeck".

Mr. Mount: Do you want to say "Or weatherdeck"?

Mr. Murphy: "Maindeck or weatherdeck".

Q. After the chief officer got those lifeboats lowered to the main or weatherdeck level outboard as you testified, was that before these two bombs were dropped? A. Yes, sir, I believe that was just before the bombs were dropped.

Q. After the chief officer got that done what did you order him to do? A. I ordered him to stand by on the forecastlehead.

944

Q. Did you order him to stand by anything in particular? A. I ordered him to stand by his anchors so we could get our anchor in and so I told him that if we were injured by the bombers I would try to put her ashore before she sank so the troops would have a chance to get off the ship instead of being drowned like rats.

Q. At the time these bombs were dropped where was the chief officer so far as you know? A. On the forecastlehead.

Q. Meanwhile did the troops aboard your ship get those Browning machine guns into action? A. Yes, sir.

Q. Did they man and operate those guns while the attack was going on and while these bombs were dropping? A. Yes, sir.

945

Q. Did they sustain any casualties? A. Yes, sir, they did.

Q. What were they? A. The commanding officer, Major Whitely, he was one of the first casualties. He was severely wounded in the left shoulder and arm.

Q. Were there any casualties among his men? A. Yes, sir.

Q. Did you issue any orders to the military personnel other than those manning the guns? A. Yes, sir, when I saw that Major Whitely was wounded I sent for the next in command, a Captain Jacobs.

946 Q. What order did you give him? A. It took a little time before they got hold of him. When he come up on the bridge I told him to get his men under shelter either on the shelterdeck or in the tween decks.

Q. Did that order include the men that were manning the machine guns? A. No, sir.

Q. Did it mean everybody else? A. It meant everybody that was not fighting the enemy and that was not engaged in operating the ship.

Q. Well, you say operating the ship—were the military
947 personnel operating the ship in any way? A. No, but the crew was on deck.

Q. As to the crew did you issue any orders, your own crew? A. I don't believe I did. They were pretty well under shelter except the carpenter and a man that was standing by on the forecastlehead.

Q. Coming back to your orders to Captain Jacobs then to get the men under shelter, did you mean that he should get under shelter all military personnel not actually engaged in operating the machine guns? A. Yes, sir, that is what I told him.

Q. Where is the shelterdeck of the *Portmar*? A. The
948 shelterdeck, that is a part of the weatherdeck running through the midship houses.

Q. Where is the tweendeck of the *Portmar*? A. That is one deck below the weatherdeck.

Q. Were there any casualties among the seamen on your vessel? A. Yes, sir.

Q. What were they? A. There was an able seaman killed on the boat deck.

Q. What was his name if you remember? A. I believe it was Thomas Tyrell.

Q. Anyone else? A. Several were wounded. There was a fireman I remember, Costello — several others whose names I don't remember, one of them being an ordinary seaman named Freshour and the other one being a deck engineer.

Q. The second bomb that landed in the water alongside the vessel on the port side in the way of the bridge, what effect did that have on the ship as you observed it? A. Either one of the two almost lifted the ship out of the water. I remember the one that fell alongside of the bridge tore the shirt on me and I had a pair of binoculars hung around my neck—the binoculars and my cap completely disappeared. I haven't found the binoculars yet.

Q. What effect did it have on the glasswork on the bridge? A. It completely demolished the bridge.

Q. How about the chartroom? A. Also the chartroom. 950

Q. How about the captain's office? A. My quarters, the doors in my quarters they opened inwards and they were closed but they were blown up and one of them was found on the boat deck.

Q. What effect did it have inside your quarters in your office where you kept your papers? A. All the drawers, all the files and all the lockers, they were blown wide open and everything in them was blown up.

Q. What effect did it have on the radio shack up on the boat deck? A. The radio shack was almost lifted off its foundation, everything in it was demolished, doors torn up, paneling and wainscoting torn up, the radio house lifted up so you could see underneath into the house. 951

Q. Did it have any effect below in the midship accommodations? A. Yes, sir.

Q. What was it? A. The midship accommodations were all completely demolished, everything was torn to pieces, all the lockers were blown up, all the drawers came out of the files and the desks, paneling and ceiling, wainscoting, were torn up and spread all over the quarters.

Q. Do you attribute that effect to the second bomb or to the first bomb or to both? A. After I saw it I didn't know how much had been done by the first or the second. I would say that both of them had some effect on demolishing the houses.

952 *Deposition of Axel Michelson—Direct.*

Q. While this was going on were you trying to pay attention to the position of your ship and to the measures to be taken to get your ship out of danger? A. Yes, sir.

Q. Was there any further attack by the aircraft after those two bombs were dropped? A. Yes, sir, fighters.

Q. Will you now describe the attack by the fighters on the ship after the two bombs were dropped? A. The fighters kept coming in and they seemed to come along our starboard side from aft to forward. We had our lifeboats swung over the side there, they demolished the two lifeboats. We had a bunch of rafts that had been taken aboard for the soldiers—they were over the side, they consisted of gasoline drums enclosed in a sort of framework. They sunk a great number of them, perhaps more than half of them.

953

Q. Did the fighters attack the vessel on the port side with machine gun fire? A. Yes, sir.

Q. And aerial cannon fire? A. Yes, sir.

Q. What effect did that aerial fire have on the starboard lifeboats? A. I cannot say what effect that had on the lifeboats. I saw that the lifeboats were demolished when the fighters came in from aft going to the starboard side of the ship.

954

Q. Did the aerial fire penetrate the lifeboats? A. Yes, sir.

Q. Did the aerial fire have any effect on the rigging of the booms of the vessel, the running rigging of the vessel, the standing rigging? A. It cut the running rigging—three of the booms had their topping lifts cut so they came down.

Q. What did they do when they came down? A. They took along with them everything in the way of them.

Q. Where was the greatest damage of that sort, at what hatch? A. The greatest damage was at No. 4 hatch—No. 4 boom on the port side came down and went through the radio house and tore a ladder off the boat deck.

Q. What effect did the aerial machine gun and cannon fire have on the port side of the ship, the shell plate? A. It tore hole after hole in the shell plate.

Q. In what area? A. That was all from aft until the fireroom on the port side.

Q. In the way of what holds would that be? A. That would be in the way of No. 5 and No. 4 holds, the engine-room and the fireroom.

Q. Looking at the plan, Libellant's Exhibit 2 for identification, will you mark the area, using this red pencil, in which the port side shell plating of the vessel was affected 956
by the aerial machine gun and cannon fire. Use the one that shows it best. A. (Marking plan) This will show it best—that shows in a general way the area affected.

Mr. Murphy: The witness marks with red pencil on plan numbered 3 on Libellant's Exhibit 2 for identification the area so affected.

Q. You have placed these marks on the skin of the ship on the port side running generally from amidships aft. How far above the water line or with relation to the water line where were those holes? A. They were all the way from the weatherdeck and down to the water line, some even 957
below the water line.

Q. How many holes were there? A. A good long time after I had a chance to count them and I counted 91 of them.

Q. What effect did the aerial machine gun and cannon fire have on the decks of the *Portmar*? A. Well, the decks were penetrated both aft and forward and the boat deck in numerous places, steam pipes were penetrated, steam escaping, chains torn to pieces and splinters, smokestack was penetrated, all ventilators were penetrated, the booms all were splintered and marked by machine gun fire with the exception, I believe, of one or maybe two.

Q. One or two what—booms? A. Cargo booms.

Q. How long did this aerial machine gun and cannon attack by the fighters last after the bombs were dropped?

958 A. Say half an hour. They would go away and return when they saw that we were still afloat.

Q. After that aerial machine gun and cannon attack occurred did you receive any report from the chief officer? A. Yes, sir, he told me that there was fire in No. 4 hold in the ammunition.

Q. Did the chief engineer report that any measures had been taken with regard to that fire? A. Yes.

Q. What did he say? A. They were putting the fire pumps on it. He was telling me also that she was starting
959 to take water aft in No. 4 and 5 holds through holes near or below the water line and I told him to put the pumps on and keep her afloat.

Q. Did you give any orders on hearing that your ship was making water in that way? A. Yes, sir, I told the chief mate to get his anchor up.

Q. What was your intention in giving that order? A. My intentions were to beach her if it was possible before she sunk in the middle of the harbor like I had seen other ships do.

Q. Did you order the chief officer to weigh anchor? A. Yes, sir.

960 Q. Was the chief officer able to get the anchor up promptly? A. No, sir, he was not because the steam lines running forward to the windlass, they had been penetrated and opened up by machine gun fire and there was a great loss of steam pressure so it was a slow process of getting his anchor in. He was all alone on the forecastlehead too because the men that had been with him up there, they had sought shelter.

Q. Did the chief officer finally succeed in operating the windlass with what steam he had and getting the anchor aweigh? A. Yes, sir.

Q. Did the chief officer report to you when the anchor was aweigh? A. He signaled to me that the anchor was aweigh.

Q. Did the Japanese aircraft resume their attack? A. Yes, sir, they did.

Q. When the chief officer signaled that the anchor was aweigh did you give any order as to the engineroom telegraph? A. I was on the starboard side of the bridge watching the mate getting his anchor in and the third mate, Mr. Muir, was standing by the engineroom telegraph on the starboard side.

Q. Let me ask a question about those engineroom telegraphs: Where are they located on the *Portmar*? A. They are located on the wings of the bridge, navigating bridge. 962

Q. Are they in the pilothouse? A. No, sir.

Q. Are they out on the open wing of the bridge? A. Yes, sir.

Q. How many were there? A. Two, one on each side.

Q. One on the port wing? A. And one on the starboard.

Q. Where was Mr. Muir standing? A. He was standing by the telegraph on the starboard wing of the bridge.

Q. What order did you give him? A. I said "Full ahead, Mr. Muir".

Q. And what did he do? A. Just then I saw him falling and he says "Captain, they got me" and I saw that they had gotten also the engineroom telegraph.

963

Q. What do you mean by gotten the telegraph? Just express it so that we get it clearly on the record. A. They had demolished it so it could not be used.

Q. By aerial fire? A. Yes, sir.

Q. How far away were you standing when that happened? A. Oh, perhaps four or five feet.

Q. What did you do then? A. I stepped over Mr. Muir and went through the wheelhouse over on the port wing of the bridge to the telegraph over there and put her full ahead myself.

Q. Was the port engineroom telegraph in operating condition? A. Yes, sir.

Q. Did the engines respond to that signal which you gave? A. Yes, sir.

Q. Did the vessel start to move ahead down the harbor? A. Yes, sir, she did.

Q. Did you give any order to the chief officer at that time? A. I did not give him any orders because there was such a noise and racket that you couldn't hear anything. I motioned to him to come from the forecastlehead up on the bridge.

Q. When he got there what did you tell him to do? A. I told him, I said "Mr. Bullock, you better go up on the compass bridge and give us the courses down the harbor
965 here" because the charts had all been blown away and I had made up my mind that I was going to run down the Middle Arm of the harbor. I saw there was a nice beach down close to what I thought was an Australian military camp.

Q. Now, Captain, looking at this chart, is the Middle Arm indicated on the chart? A. (Referring to chart) Yes, sir.

Q. Will you point it out? A. Yes, sir, this is the Middle Arm, this is the East Arm (indicating).

Mr. Murphy: The captain indicates two arms shown on the chart. One is labeled "Middle Arm"
966 and the other "East Arm".

Q. Is the Middle Arm labeled on the chart the area you intended to pass through? A. Yes, sir, I could see the camp on the Channel Island and I thought that was a military camp (indicating).

Mr. Murphy: The captain points to a camp labeled on the chart "Leper Station".

Q. Is that the camp you thought was the military camp by eyesight of the actual terrain there? A. Yes, sir.

Q. Was that the island you intended to navigate toward? A. Yes, sir.

Q. Is that the island marked "Channel Island" on this chart? A. Yes, sir.

Q. Did the mate go up on the flying bridge? A. Yes, sir.

Q. Is that where the standard compass was? A. Yes, sir.

Q. Did the mate make any report to you after he got up on the flying bridge? A. He said "Captain, the standard compass is gone".

Q. What did you do? A. I jumped up to the compass bridge. 968

Q. By compass bridge do you mean the bridge above the navigating bridge? A. I mean the deck above the wheelhouse and the navigating bridge.

Q. Is that the top bridge of the ship? A. That is the top bridge on our ship, or was, yes.

Q. Looking at Libellant's Exhibit 2 will you point out the top bridge or the compass bridge which you have mentioned? A. (Indicating) That is this one here.

Mr. Murphy: The captain draws an arrow to the bridge above the words Chart and wheelhouse" which I will mark "Compass bridge".

969

Q. That compass bridge is the highest bridge on the ship above the water line? A. Yes, sir.

Q. When you got up to the compass bridge what did you find with respect to the standard compass? A. I found that what the mate said was true.

Q. Well, what did you find? A. I found that it had been completely demolished, blown to pieces by machine gun fire.

Q. What did you do then? A. I jumped down on the navigating bridge again, was going to give the helmsman the course from the steering compass in the wheelhouse.

Q. Will you indicate the navigating bridge on Libellant's Exhibit 2?

(Witness indicates.)

970 Mr. Murphy: The captain draws an arrow which I will mark "Navigating bridge".

Q. When you got to the navigating bridge what did you find? A. I found that the steering compass had gone while I was on the top bridge—I found that that had been blasted out of its gimbals.

Q. You say that occurred in the interval while you were up on the flying bridge? A. Yes, sir.

Q. So far as you know was the navigating compass in
971 serviceable condition when you ran up to the compass bridge? A. I am fairly certain it was.

Q. When you came down you found it knocked out of its gimbals? A. Yes, sir. I found also that I could see out through the roof of the wheelhouse in the port side, the forward port corner. The man at the wheel was still there and I asked him if the steering gear was all right and he said "Yes, but this is getting to be damn nasty, Captain".

Q. How did you direct the wheelsman how to steer from that point on? A. Well, there was no more windows in the wheelhouse so we could see out ahead from the wheelhouse and I told him to steer for a certain point what I thought would give me the best water running down the Middle
972 Arm, which he did.

Q. What orders did you give the chief officer at that point? A. I told the chief mate that as soon as we got down close to that camp down there I would anchor and get the men off the ship.

Q. Did you give the chief officer any instructions as to where to go and what to do while you were running down the harbor? A. I don't remember that I did.

Q. Did you give any orders with respect to heaving of the lead? A. Yes.

Q. Whom did you give that order to? A. I gave that order to the chief mate. I said "When we get down towards that anchorage down there you better stand by with your hand lead so we can get in just as far as she will float".

Q. Was it your intention at that time to beach the ship or to find an anchorage? A. Well, I had both things in mind. I wanted to get the soldiers off the ship first because I saw what was happening all around.

Q. Was there any further difficulty with fire on the vessel? A. Yes, sir, once more it was reported to me that there was fire in No. 4 hold and I told the mate to go and see about it.

Q. Did he later report to you about that fire? A. Yes, he came back and told me that it was military equipment, I believe tents, and he said that they had the fire under 974
control.

Q. Did you receive any other report at that time about the extent to which the ship was making water? A. A soldier and later on I believe the second mate came and told me she was making quite a bit of water in No. 4 and 5 holds.

Q. Were you proceeding at full speed ahead down the Middle Arm at that time? A. No, sir, after we got her well under way it seemed that the attacks from the planes eased up some and I slowed her down because we were dragging a bunch of those rafts after us and if we had kept on full speed we would have broken them all adrift and I wanted to have them alongside so that the soldiers could 975
use them in case of having to get away from the ship in a hurry.

Q. Was anyone on those rafts at that time? A. Yes, sir, there were several men in the rafts. There was also men in the two lifeboats on the starboard side—they were in the water by that time, I don't know whether they were shot down or fallen down.

Q. How were they lying in the water, the lifeboats? A. They were just about awash. It struck me they were kept afloat merely by the tanks—there are air tanks in all lifeboats, there was before the war.

Q. By that are we to understand that some of the tanks had remained intact enough to keep the lifeboats afloat just a while? A. Yes, sir, they must have.

976 *Deposition of Axel Michelson—Direct.*

Q. You were proceeding then at slow ahead so as not to swamp these rafts you were towing? A. Yes, sir.

Q. Was there anyone in the lifeboats? A. Yes, sir, there was members of the crew and a number of soldiers.

Q. Did the Japanese aircraft return to another attack on the harbor after that point? A. Yes, sir, while going down the Middle Arm there was another squadron of Japanese planes came in from just about the same quarter as they came in in the morning.

Q. By that do you mean from the southwest? A. Just
977 about from southwest.

Q. Did they attack the *Portmar* as she was going down the harbor? A. No, sir, they did not attack any ship in the harbor. They went over the harbor and they went in over town and seemed to be going down towards the military camps that were situated south or south southeast of Darwin some distance out of town.

Q. As you proceeded down the harbor did any vessel lend you any assistance? A. There was an Australian corvette, the *Vigilante,* came alongside and asked if she could be of any assistance.

Q. What reply did you make to that offer? A. I told
978 him the fix I was in, I had no compasses and no charts and I told him to lead the way down the Middle Arm to a safe anchorage.

Q. Did the *Vigilante* comply with your request? A. Yes, sir.

Q. Did she steam ahead? A. She steamed ahead and we followed.

Q. Did the lifeboats which you were towing remain in tow of your vessel all the way down? A. No, sir, I believe the crew cut them loose, I can't say for certain, I wasn't looking much astern, I was looking ahead.

Q. Did the *Portmar* eventually get down opposite the point which is marked on the chart as the Leper Colony on Channel Island? A. Yes, sir.

Q. What did you do then? A. I anchored.

Q. Have you the bearings of that point of anchorage? A. Yes, sir.

Q. Will you read the bearings off? A. Yes, sir. (Reading) The position I anchored in was 12, 33½ south.

Q. And what was your longitude? A. 130 degrees 51.2 minutes east.

Q. Will you plot that anchored position on the chart?

(Witness does as requested.)

Q. Have you plotted on that chart the position at which the *Portmar* was anchored off Channel Island? A. Yes, sir. 980

Q. Can you give us the approximate time at which that anchor was dropped? A. Not unless I can take a look in the logbook.

Q. By all means do—that is February 19th. A. (Referring to logbook) 1.05.

Q. 1.05 P. M.? A. That's right.

Mr. Murphy: I will ink over the lines which you have drawn, the intersection of the pencil lines, and I will put a legend "*Portmar* anchored 1.05 P. M. 2/19/42".

Q. What orders did you then give with regard to the troops on board your ship? A. I told the chief mate to put overboard a launch that we carried for the American Army that we were going to take with us to Koepang. 981

Q. What was the name of that launch? A. *Nevbet.*

Q. Was that launch put on board the *Portmar* before you started out across the Timor Sea in the convoy? A. Yes, sir.

Q. Did the chief officer succeed in getting that launch lowered away? A. Yes, sir.

Q. What boom did you use for that? A. We used the heavy thirty-ton boom at No. 2.

Q. What did the *Vigilante* do after that? A. The *Vigilante* went away—I cannot tell you where.

982 Q. Did you then start to disembark the military personnel from the *Portmar*? A. Yes, sir.

Q. How many trips did the *Nevbet* make from the *Portmar* to shore?

Mr. Collins: I don't want to interrupt but I object to this as wholly immaterial and having no bearing on the issues at all. It seems to me it is just a waste of time to go into how many trips this launch made with troops. If it has any materiality I will withdraw my objection but I don't see it.

983 Q. How many trips did she make from the *Portmar* to Channel Island? A. Two.

Q. How many soldiers did you disembark? A. Say fifty, sixty.

Q. Did the *Vigilante* ever come back again? A. It seems to me a small Australian corvette came alongside and picked up a number of soldiers.

Q. Did all the American soldiers get ashore from the *Portmar* while you were there at anchor? A. Yes, sir.

Q. In one craft or another? A. Yes, sir.

Q. While the soldiers were being disembarked did the
984 chief officer make any report to you about the condition of the vessel? A. He told me that the ship was making so much water that it was doubtful whether we would be able to keep her afloat.

Q. Did the chief engineer report to you as to operation of the pumps? A. Yes, sir.

Q. What did he report? A. He told me that his pumps were all right but his bilge lines were either busted or broken or perforated and full of scale and dirt and that he was not making any headway on the water in No. 4 and 5. I believe that he finally opened up No. 4 and 5 and let the water into his engineroom bilge.

Q. Did the chief engineer report what that scale and dirt was that was clogging the bilge lines? A. That was

all stuff that had been dislocated during the bombardment and heavy bombing.

Q. Did the chief engineer report what measures he was taking to try and get the water out of No. 4 and 5 holds without using the 4 and 5 bilge lines? A. Yes, he told me that he was letting it into the engineroom bilge and putting the main circulating pump on it.

Q. Did the entry of that water in the ship have any effect on the trim of the vessel? A. Yes, sir, it did, she took a port list more and more so. As she took more and more of a port list more and more of the holes got below the 986 water line.

Q. By holes you mean (spelling) h-o-l-e-s? A. Yes, I mean the holes caused by the cannon and machine gun fire along the port side.

Q. Did that increase the rate at which the water was entering the ship? A. Yes, sir.

Q. Did you give any orders in view of the list the vessel was taking? A. Yes, I told the mate that I would run her ashore if possible down south of Channel Island because we would be unable to keep her afloat and I thought she would be in a pretty sheltered position down there.

Q. Did the mate get the anchor aweigh again? A. Yes, 987 sir, he had merely lowered it over the side, there was no chain up on her.

Q. Did you order the mate to get the anchor aweigh? A. Yes, sir, I told him "If you can't get it aweigh I will burst it out".

Q. After the anchor was aweigh in what direction did you proceed? A. Down the Middle Arm again.

Q. In what direction? A. South by east, maybe south southeast.

Q. What were you making for? A. I was making for a cove or a place that I could see from where we had anchored and that looked like a pretty nice place.

Q. Will you indicate that cove on the chart? A. It is this place here (indicating on chart).

Q. Suppose you draw a large circle to show the general area that you wanted to get into?

(Witness does as requested.)

Mr. Murphy: The witness draws a circle on the chart indicating the area he wished to reach.

Q. How did you navigate down the Arm from that anchorage toward that area without any compasses? A. Well, I wasn't much concerned about the course. I was only concerned about the depth of water. I tried to tell
989 by the color of the water where I would find water that would keep the ship afloat.

Q. Did you order the chief officer to assist you in observing the color of the water? A. Yes, the chief mate was helping me.

Q. Did you pick your way among the reefs in that way? A. Yes, sir. I didn't get her in quite as far as I thought I would because there was a knoll on the starboard side that I missed and I ran her up on it.

Q. By knoll do you mean a shoal? A. Yes.

Q. A hump in the bottom? A. A hump in the bottom, yes, that is a better name for it.

990 Q. Was that the point where you actually ran her aground? A. Yes, sir.

Q. On what side of the ship did she strike? A. On the starboard side.

Q. In what area of the vessel? A. From about amidships to aft.

Q. What kind of a bottom? A. I later on did quite a bit of sounding. It seems to me that it was stiff clay.

Q. In what depth of water did she take ground? A. Say about twelve feet.

Q. And what was the draft of the vessel when last observed when you were, say, at anchor up near Port Darwin on the morning of February 19, 1942? You may look at the log or your notes. A. (Referring to log) The last draft that is down in the logbook is under February 14th

when we left Darwin for Timor. It says 11.4 forward and 13.10 aft, making a mean of 13.01—no, I beg your pardon, this was in the morning—later on in the evening the draft sailing it says 11.4 and 15.2, making the mean of 13.3.

Q. In between that observation of draft and the time you took ground was any of the cargo on board the ship taken out of the ship? A. No, the only thing that was taken out of the ship was—I find here again arriving in Darwin, that was the 18th.

Q. What was the draft then? A. 11.2, 14.8.

Q. 11.2 forward and 14.8 aft—the mean? A. Mean 992
12.11.

Q. Does that draft substantially represent the draft of the ship at the time she took ground? A. Very near, may have been an inch or two less.

Q. At what time did the vessel run aground as you have described? A. The vessel grounded at 2:12.

Q. P. M.? A. P. M., south of Channel Island.

Q. On February 19, 1942? A. That's right.

Q. Have you any bearings of that stranded position? A. Yes, sir.

Q. Will you please say what they are and then plot them on the chart? A. (Referring to log) It says here the 993
place where ship finally rested was in 12 degrees 34 minutes south latitude, 130 degrees 52 minutes east longitude.

Q. Will you plot those on the chart? A. It says "very nearly" and I notice by looking at this chart here that it is a little different from what I had in Darwin, I notice a difference in the shape of the cove.

Q. Well, using that chart will you just plot those bearings on the chart? A. Yes. (Plotting chart) That is the way it comes out. I was a little further west—about there, I would say (indicating).

Q. Well, that is close enough.

Mr. Murphy: I will ink over the intersecting lines you have drawn and place a legend "*Portmar* stranded 2:12 P. M. 2/19/42".

994 Mr. Collins: I would like to note an objection to the use of the term "stranded".

Q. Are these bearings you have plotted on this chart intended by you to be exact? A. No, sir. I had no compasses left on the ship.

Q. How did you get those bearings? A. Those bearings I got from an Australian corvette that a day or two afterwards got alongside of the ship and I went up and took them from her gyro compass on her bridge.

995 Q. Was she lying alongside of the *Portmar* then? A. Yes.

Q. Had the *Portmar* changed position in any respect between the time she first beached and the time you took those bearings? A. Yes, sir.

Q. About how far? A. I couldn't say for certain but on the 19th when the crew left the ship, before the crew left I let go the port anchor. I stood by the ship for two days. About half the time I was in the launch *Nevbet* and I found on the first high water that she had straightened up some on the loose chain that was hanging down over the port anchor.

996 Q. About how far would she have shifted, as an estimate? A. Oh, possibly a few hundred feet.

Q. Are we to understand that you yourself took these bearings by the gyro compass or the pelorus? A. On the Australian corvette.

Q. On the Australian corvette lying alongside? A. Yes, sir.

Q. On what date? A. I am not too certain. I believe it was the following day, either the 20th or the 21st.

Mr. Murphy: I offer this chart for identification as Libellant's Exhibit 4.

It is so marked.

Q. After the ship was beached did you make any effort to do anything about the holes that were in the port side

shell plating as you have described as a result of the aerial fire? A. Yes, sir, I told the mate to go down to see what he could do about it and told him to plug as many of them as possible and try to keep the ship afloat.

Q. How was the ship lying there at that moment after you beached the ship? A. She was lying with a heavy port list, the list becoming more and more of a list because at that time the water had started to run out of the harbor—it was an ebb tide.

Q. Was she aground under her port side aft? A. She was aground on the starboard side aft. 998

Q. Are we to understand that she was resting on the starboard side aft and listing over to port? A. That's right.

Q. Was she aground forward? A. No, sir, I don't believe it.

Q. Did the list of the ship remain constant? A. No, it increased all the time as the water ebbed out of the harbor.

Q. What effect did the increase of the list of the ship have upon the work of plugging the holes in the port side along the water line? A. The mate had his men over the side and some of those rafts I have described that were given us for the soldiers, as it took more and more of a list she was hanging up over the rafts and more and more of the 999 holes would go below water. It became more and more difficult to do work there, more and more water ran into the ship as more and more holes would get below the water line.

Q. Was any effort made to control the height of the water in the vessel by means of the bilge pumps? A. Yes, sir.

Q. Was the engineroom bilge pump kept going? A. Yes, sir.

Q. Did it succeed in keeping down the increase in the height of the water in the ship? A. No, sir, it did not. It did for a while but only for a while. The chief told me that it was gaining.

Q. Did you give any orders with respect to the refrigerator plant on the ship? A. Yes.

Q. What was that? A. The pipe in the refrigerator plant had been penetrated by machine gun fire and let up ammonia fumes that penetrated the whole ship. I asked the chief to see what he could do about it and I know that he made a determined effort to stop the leaks but did not succeed because it was too dangerous.

Q. Did the chief engineer make any report to you later that afternoon about whether he could succeed in keeping
1001 down the water level in the vessel? A. He told me he could not.

Q. About what time did he report that to you? A. I believe that was between 4 and 5 o'clock.

Mr. Collins: Still on February 19th?

The Witness: This is all February 19th.

Q. How many degrees was the ship listing to port by the time the chief engineer made that report to you? A. Oh, the list was getting to be dangerous, you couldn't retain a foothold anywhere.

Q. How many degrees to port? A. Say about 40, a few
1002 more or less, maybe.

Q. Did the chief make any report to you about any effect on the boilers if the list increased any more? A. He says "Captain, if this list is going to increase any more I cannot guarantee that the boilers are not going to blow up".

Q. Did you make any decision after receiving that report from the chief engineer? A. Yes, I told the chief engineer to as much as he could and as near as he knew how secure everything in the engineroom and get his men out of the engineroom. I told the mate that I was going to take the crew off the ship before she was going to turn over because I was afraid she was going to turn over. Just about that time the Australian corvette *Vigilante* came alongside again and he says "Captain, if you will send your men down on

me now I will take them off but unless you do it now I won't dare to stay alongside of you because your ship is going to turn over".

Mr. Collins: I move to strike out the last part of the answer as to any testimony as to what the mate of the *Vigilante* said.

Q. Did you order your crew to leave the vessel in view of the danger of the ship's capsizing? A. Yes, sir. I was also afraid of the boilers blowing up.

Q. Did you issue any orders to the chief officer? A. I 1004
told the chief officer to check off all the men and see how many he had and see that everybody that was aboard the ship got off.

Q. Did you do anything with regard to the anchor before the men left the vessel? A. Yes, sir.

Q. What did you do? A. I went up and let go the port anchor myself. I believe the chief mate was with me.

Q. What was the purpose of dropping that port anchor? A. Well, I knew that there was very high tides in Darwin Harbor and I thought that if the night-tide should come in and find the ship just aground and not anchored it might move the ship and put her in a worse place than she was in. 1005

Q. Did the deck and engineroom crew go away then on the *Vigilante*? A. Yes, sir.

Q. Did the chief officer and chief engineer go with them? A. I gave them instructions—

Q. Answer the question. A. Yes, sir.

Q. Did you give the chief officer and chief engineer any instructions as they went aboard the Vigilante? A. Yes, sir.

Q. What did you order them? A. I told them to keep the crew together, get in to Darwin and if possible get in touch with the American military authorities and see that the crew were taken care of.

Q. What did you do then? A. I went in the launch *Nevbet*.

1006 Q. Was anyone with you? A. Three men of the crew—I asked them to stay by me in the launch and they did so.

Q. What did the launch *Nevbet* do after you got on board? A. Well, the men, they were afraid the ship was going to turn over and we stayed a little off the ship for a while. The men they were mostly watching for Japanese airplanes.

Q. Was there any further aerial attack by the Japanese in the harbor of Port Darwin during the afternoon of February 19, 1942 while you were beaching the ship and
1007 while you were trying to plug the holes? A. Not that I know of or remember.

Q. How long did you remain in the *Nevbet* alongside the *Portmar* after going aboard on the early evening of February 19, 1942? A. After dark she started to straighten up some and I told the men I wanted to be put aboard ship. We went alongside of the ship and with the exception of one we all went aboard the ship.

Q. You said the ship was starting to straighten up some. What caused that? A. The incoming tide.

Q. When you went on board the ship what list did the ship have? A. Well, she had a lot less then than she had
1008 when we left her and decreasing all the time while we were aboard ship.

Q. With the rise of the tide? A. With the rise of the tide, yes, sir.

Q. Just for the record, Captain, did the vessel ever capsize? A. No, sir.

Q. How long did you remain on the ship after you went aboard her from the launch *Nevbet* that evening? A. We were aboard practically all night. I wanted to stay aboard the ship but when daylight came the men would not stay aboard the ship.

Q. Was that because of fear of further Japanese attack? A. Yes, sir.

Q. What did you do then? A. Well, there was no water on board ship and there was nothing to eat so I went with them in the launch.

Q. Was there any steam? A. No, sir.

Q. Was there any electricity? A. No, sir.

Q. Was there any domestic or sanitary water? A. No, sir.

Q. What did you do? A. I went in the launch with the men and we went in under the mangroves a little to the south of the Channel Island for a while.

Q. This was on February 20, 1942? A. Yes, sir.

Q. And then what did you do? A. While we laid there watching developments in the harbor we saw Japanese planes coming in over the town and to the south we heard 1010
some bombing, I don't know where it was.

Q. Did you return to the *Portmar*? A. We returned to the ship several times during the day. Some of the men thought that——

Q. Well now, wait a minute, Captain, you are not permitted to testify to what some of the men thought. That is just a principle of law—so we will just stick to what you did. What did you do on board the vessel on February 20th when you went on board? A. I mostly observed the condition of the vessel.

Q. Did you stay on board the vessel on the night of February 20th to 21st? A. Yes, sir.

Q. Did you stay on board the vessel all night? A. Yes, 1011
sir.

Q. Were you on board the vessel on February 21st during daylight hours? A. Yes, sir.

Q. Did you remain on board the vessel on the night of February 21st to February 22nd? A. No, sir.

Q. What time did you leave the vessel? A. It must have been in the late afternoon of the 21st.

Q. At about what time? A. Oh, possibly four or five o'clock, I can't be certain.

Q. How did you leave the vessel? A. We left in the launch because we had no more water to drink and we had to get into the islands to get water to drink.

Q. Before you left the vessel what did you do? A. I went to let go of the starboard anchor also.

Q. As you left the vessel what was the position of her anchors? A. Well, the port anchor was leading ahead.

Q. About how far? A. I can't be certain, I don't know.

Q. Where was the starboard anchor? A. The starboard anchor was hanging at the bow and I let it go.

Q. And how did it drop? A. Straight down—I let it take all the cable it would which meant that a lot more run out than the depth of water.

1013 Q. Why did you drop the starboard anchor? A. Because I was worrying about getting in contact with people that could help me take care of the ship and try to notify my owners back in the States of what had happened. Also I had to take care of the crew and see that they were taken care of. I knew that during that period of the year sometimes a very heavy cyclone could walk across the northern territories of Australia.

Q. Was it that you wanted to hold the ship in position? A. Well, I thought that it would be added security that the ship would not run away from where she was.

Q. Did she have any list at the time you left her on February 21st? A. Yes, sir.

1014 Q. About how much? A. Say 10 degrees. I left her on the 21st but I came back again on the 21st, the same evening.

Q. Well, now, will you tell us where you went between the time you dropped the starboard anchor and went in the launch—where did you go and what did you do? A. We went into Channel Island or just south of Channel Island. We had found a little spring where there was fairly good fresh water. We went in there to fill our cans. We saw a launch coming down the harbor and after we had gotten the water we waited until the launch came down. I had my binoculars with me in the launch and I thought it was the chief mate that I could see standing up in the launch.

Q. What were those binoculars that you just mentioned? Was that the pair that was blown off you in the bombing

of February 19th? A. No, sir, the pair that was blown off me was ship's binoculars. Those I am talking about were my own personal binoculars—I have got them yet.

Q. Well, go ahead, tell us what you did. A. I could see it was the chief mate so we went up from the beach to meet them a little and waved to them and the mate, he recognized the launch that he had handled a couple of days before and he came in and he had with him in the launch a Colonel Petterson and another gentleman whose name I later found out was Williams, an Australian.

Q. So that we can identify this Mr. Williams, is he the 1016
same Mr. Williams that later brought suit against the vessel for salvage, in company with others? A. The very same.

Q. Now, when that launch came along with Mr. Williams and Colonel Petterson what did you do? A. I did go in their launch because the mate told me that they had taken him along out to the ship—Colonel Petterson had—because Colonel Petterson was the commanding officer of the 148th Field Artillery and all his 75s were aboard the ship and he wanted to see if they could be salvaged and taken out of the ship.

Q. Did you go back to the *Portmar* with Colonel Petterson and Mr. Williams in their launch? A. Yes, sir.

Q. Will you describe what occurred in that conversation 1017
on board the *Portmar*? A. Well, we went aboard the *Portmar* and Colonel Petterson was anxious to find out all about his guns, where they were located in the ship and what we thought of the possibilities of salvaging them.

Q. Salvaging the guns? A. Yes, sir.

Q. Did Colonel Petterson and Mr. Williams make an investigation of the disposition of the cargo in the ship? A. Well, they did as much as was possible to do. The mate and myself, we explained to them as near as we could where the guns were located, how we thought they could be gotten out.

Q. Was anything said at that conversation between Mr. Williams, Colonel Petterson and yourself aboard the ship about salvaging the *Portmar* herself? A. No, sir.

Q. What was the condition of the vessel at that time with regard to water level and with relation to her decks? A. Well, at low water she would be submerged from the aft end of the ship to the aft end of the midship house.

Q. And how about at high water? A. At high water the water would be over the poop and run into the shelterdeck.

Q. After this conversation on board the *Portmar* what did you do? A. I went ashore with the Colonel in his launch.

Q. Did Mr. Williams go ashore with you? A. No, sir, I don't believe he did.

1019 Q. Is it your recollection that he remained at the vessel? A. Yes, sir, it seems to me that he knew that one of the little Australian corvettes would later on be down to the ship and I believe he planned them taking over, I don't know, I am not quite certain of this.

Q. This is about what time on the night of February 21, 1942? A. This would be towards dusk.

Q. After that did you go to Port Darwin with Colonel Petterson in his launch? A. Yes.

Q. When you got there what did you do? A. I went down to the American camp about twenty miles south of Darwin and reported to the American commanding officer.

1020 Q. Before going to that camp did you make any effort to find any officials in Darwin? A. Yes, sir.

Q. What did you do in that regard? A. One of the first things I did when I went ashore, I had all the ship's secret documents along with me and I brought them down to the Australian Naval Control and turned them in and got a receipt for them.

Q. What do you mean by the secret documents? Don't tell us what was in them but tell us what they were. A. They were code books, for instance.

Q. You rescued those from the ship? A. Yes, sir.

Q. Is this the receipt which you received from the Australian Naval Control officer (handing same to witness)? A. Yes, sir, that is the one.

Mr. Murphy: This receipt is dated M/V *Portmar* at Port Darwin February 21, 1942. I offer a photostat of the original and ask that it be marked as Libellant's Exhibit 5 for identification.

It is so marked.

Mr. Mount: Are you going to ask him what these abbreviations mean?

Mr. Murphy: No.

Q. Are you able to tell us the meaning of these entries made in the left-hand column of this receipt? Can you 1022
tell us what the meaning of those notations is? A. They are all code books or de-code books and directives. There is one "S P"—a certain number—I forget what that was.

Q. Were those documents which you originally received from the United States Navy? A. Some of them, not all of them. Some of them I had received from the Australian naval authorities after arriving in Australia.

Q. And some of them you did receive from the United States Navy? A. Yes, sir. This "S P" was one I had received from the Navy. I happen to remember what it was.

Mr. Mount: Were any of those that you received 1023
from the United States Navy received on leaving San Francisco or were they received afterwards?

The Witness: They were received on leaving San Francisco.

Mr. Mount: Looking at this Exhibit 5 for Identification, could you point out the ones that you had on board when you left San Francisco?

The Witness: I believe those mentioned in the last three lines. I cannot be quite certain about that. Two of them I had. About the third one I am not quite certain.

Mr. Mount: And the first three were received by you when?

The Witness: They were British publications by the British Admiralty.

Mr. Collins: Did all the books relate to the navigation of the vessel while at sea?

The Witness: They practically all of them related to communications with other ships and naval authorities, British and American.

Q. Now, Captain, while you were in Darwin after you turned these documents in and got this receipt did you
1025 make any effort to find any notary in order to note a protest? A. I remember I asked the man that signed the receipt for me, I remember he was a merchant man like myself that was in the Australian Naval Reserve, and I told him the fix I was in and I told him that I would have to get in contact with a public official somewhere as soon as possible and he said, "Captain, I am afraid you are plumb out of luck".

Q. Wait a minute, I don't think you can say what that gentleman said to you, but I will ask you the question: Did you make any effort to find any official before whom you could note a protest? A. Yes, sir.

Q. And did you succeed in finding one? A. No, sir.

1026 Q. Was there any public official of any kind in Port Darwin that night when you got there? A. I doubt it.

Q. Were you able to find one? A. No, sir.

Q. Then did you go out to the military camp? A. Yes, sir.

Q. How did you get there? A. I was given transportation from Darwin on application to a military post of the Americans in Darwin.

Q. What kind of transportation did you get out to the camp? A. A military truck.

Q. How far out was the camp? A. I don't know—say twenty miles, twenty-five maybe.

Q. Did you find your crew at the camp? A. Yes, sir.

Q. Did you try to send a cable message to your owners at that time? A. Yes, sir.

Q. Whom did you speak to about that? A. The commanding officer, Colonel LaRue, I reported to him the same evening.

Mr. Collins: Commanding officer of what?

The Witness: Of the American troops in the American territory.

Q. Did Colonel LaRue say you could send your cable to your owners? A. No, sir, he did not give me any hope 1028
at all.

Q. Were you able to send a cable to your owners? A. No, sir.

Q. Did you re-visit the *Portmar* after that? A. Yes, sir.

Q. When? A. I believe the day afterwards I went back to it.

Q. Did you remain at the camp that night of the 21st? A. Yes, sir.

Q. Did you need any rest by that time? A. I needed it, I didn't get it though because there was too much to do. They told me out in the camp that they were short of everything, that the taking care of my crew was a burden 1029
on them, and I had with the few men that stood by me in the launch out there saved a lot of provisions, that is I had brought it up from where the water might get at it to places where I thought it might be safe until I could get it out of the ship, so I got hold of Mr. Bullock.

Q. Who is Mr. Bullock? A. The chief mate—and I told him I thought the proper thing for us to do was to get as much of the provisions off the *Portmar* down to the camp as possible because we did not want to burden anyone.

Q. When did you carry out that idea? A. I believe I started out the following morning.

Mr. Collins: On the 22nd?

Q. Was that on February 22nd? A. I believe so.

Q. Were you back to the vessel on the 22nd? A. Yes, sir.

Q. How long did you remain on board? A. I am not quite certain. It seems to me that I stayed aboard that night and sent the launch ashore loaded down with provisions. I am not quite certain though.

Q. In any event, were you on board the vessel on February 23rd? A. Yes, sir, we loaded more provisions.

Q. Did you remain on board the vessel on the night
1031 of February 23rd and 24th? A. I believe I did.

Q. While you were at the vessel did you observe any more Japanese attacks on the harbor or the shipping or the town? A. I saw Japanese planes coming in practically every day I was in Darwin. I saw them drop a bomb here and there in the harbor if they thought there was any activity going on. They never dropped any bombs in the vicinity of the *Portmar*.

Q. Had there been any change in the position of the ship up to the morning of the 24th of February? A. She seemed to have settled a little more by the stern and she seemed to have straightened up a little bit more.

Q. What was the effect of the rise of the tide on the
1032 bow of the ship as the tide came in? A. The effect was that the stern would stay down whereas on incoming tide the forward end of the ship would rise with the tide.

Q. What was the effect of that on her structure? A. I would say it was a very severe strain.

Q. How many times each day did that occur? A. That tide comes in and goes out twice a day.

Q. On February 24, 1942 after you had gotten the provisions which you required at the camp what did you do? A. I went down to the camp and I found out then that there was a small American ship there, the *Admiral Halstead*, had come in to Darwin Harbor loaded with gasoline and that the Army was short of gasoline and wanted to get it off the ship in the worst way.

Q. What else did they say they were short of? A. Well, they were short of lots of things, they were short of ammunition.

Q. Well, they wanted to get the gasoline off the *Admiral Halstead*? A. Yes.

Q. Was anything done with regard to your crew in that respect? A. Well, I went and saw the men about it and I said "I think we better go and give the soldiers a hand because they are in a bad fix. We all expect the Japanese to come in most any day and" I said "I don't think we can afford to lay around here loafing, we better go to 1034
work and see what we can do so they cannot accuse us of eating the provisions, we have to do something".

Q. Speaking of that Japanese invasion, what did you observe with reference to preparations for the Japanese invasion in the Port Darwin area? A. I saw practically all there was to see. I don't know if I am at liberty——

Q. I think you are because this is an impounded suit and you can speak freely as to what you saw? A. Well, I saw and I knew that all the troops in the northern territory around Darwin were ready to leave at short notice. From what I heard and saw they were ill-equipped, they were absolutely green troops without any fighting experience, 1035
they had very little in the line of supplies and equipment, they were short of ammunition for their guns. A general commanding one of the American regiments, he told me, he said "Every vehicle in my outfit is turned south and ready to go the minute the Japs come".

Q. Did you see any structures erected or barricades or anything of that nature ready to repel a Japanese invasion? A. No, there was nothing.

Q. Did your crew do anything and did you do anything to assist the Army to discharge the gasoline from the *Admiral Halstead*? A. Yes, sir.

Q. Where was the *Admiral Halstead* where you did this work? A. She was in Darwin Harbor.

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Q. Was she at anchor or at the jetty? A. She was at anchor in the daytime. The crew would leave her in the daytime.

Q. Why did they leave her in the daytime? A. For fear of the Japanese blowing her up.

Q. And when did they do the work? A. After dark they would go to work, take her in alongside the wharf and discharge as much as they could so they could have her put at anchor when daylight came again.

Q. Were you there with your crew while that work

1037 was being done? A. Yes, sir.

Q. Did you return to the *Portmar* at any time prior to the 2nd of March while this work was being done on the *Admiral Halstead*? A. Yes, sir, I did. I don't remember the dates though.

Q. How many times did you go back to the ship up to the 2nd of March, that is between the 24th of February and the 2nd of March? A. I can't say for certain, two or three times, it may have been four.

Q. Did you examine the ship on each occasion while you were there? A. Yes, sir.

Q. Did you see Mr. Williams around the ship when you went back there? A. Yes, sir.

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Q. What was he doing? A. He was making preparations and later on taking up the 75s of Colonel Petterson of the 148th Field Artillery.

Q. Did you see Captain Williams—I mean Mr. Williams—do anything— A. It doesn't make any difference, he was a master mariner.

Q. Did you see Captain Williams taking any steps with regard to releasing the vessel herself from the beach or to pumping the water out of her and floating her again? A. No, sir, nothing whatever.

Q. Was there any watchman in charge of the *Portmar* while you were away with your crew working on the *Admiral Halstead*? A. No, sir, none.

Q. Was there any available? A. No, sir.

Q. Was the position of the ship any worse when you got back to her during the interval of February 24th to March 2nd than it was when you left her on the night of February 24th? A. Just about the same, it had not either worsened or bettered very much.

Q. Did you return to the *Portmar* on March 2nd? A. Yes, sir.

Q. What occurred on that occasion, how did you find the ship? A. The same as on previous occasions only it seemed to me that she settled more and more by the stern.

Q. At high water, what was the level of the water on 1040
the after deck? A. At high water the water was way over the poop aft and it covered the whole ship up to the midship house and run all the way up to the forward end of the shelterdeck in the midship house.

Q. What was the list, if any? A. Say 10, 11 degrees.

Q. In what direction? A. To port.

Q. Did you visit the *Portmar* again after March 2nd? A. I visited her on March 3rd, I am fairly certain of that date—I am fairly certain of the 2nd and 3rd both.

Q. What did you find on March 3rd? A. The very same conditions prevailed.

Q. When you went to the vessel on March 3rd how long 1041
did you remain on board? A. I was there a considerable time, I cannot say exactly how long.

Q. Did you remain on board on the night of March 3rd and 4th? A. No, sir.

Q. Did you go back to the camp of the 147th Field Artillery that night? A. Yes, sir.

Q. Captain, it was the camp of the 147th Field Artillery, you say? A. Yes, sir.

Q. But the troops that you took on board for the trip across the Timor Sea was the 148th Field Artillery? A. That's right.

Q. Then there were two United States Field Artillery regiments in Port Darwin? A. Yes, sir.

1042 Q. Thus the camp where your crew were quartered and where you were going from time to time was the camp of a different regiment from the regiment of troops some of which you carried on board the *Portmar* across the Timor Sea and back? A. Yes sir, the 148th that we attempted to carry to Timor, they lost all their supplies and stores aboard the *Portmar.*

Q. When you say they lost all their supplies and stores do you mean they lost their guns also? A. Yes sir, their field guns.

1043 Q. Are we to understand that they lost those field guns? A. Well, they were aboard the *Portmar,* sunk with the *Portmar.*

Q. Were those guns later rescued by Captain Williams? A. Yes, sir.

Q. And were their supplies and stores also taken off the *Portmar* as far as you know? A. Some of it, but it was found to be ruined.

Q. After you left the *Portmar* on the evening of March 3, 1942 did you ever see the *Portmar* again in Port Darwin Harbor? A. No, sir.

Q. When did you leave Port Darwin? A. I left Darwin or the camp south of Darwin the 10th of March.

1044 Q. What were you and your crew doing between March 3rd and 10th? A. We were under military arrest.

Q. What was the occasion for that? A. The reason was that when I had visited the ship for the last time on March 3rd I went aboard the *Admiral Halstead,* stayed with the crew and helped them get as much gasoline ashore as possible during the night.

Q. That was the night of March 3rd and 4th, was it? A. That's right. In the morning they took us up in a couple of trucks up to the camp. We got our breakfast, cleaned up a bit, and about noon the Adjutant of the regiment, Captain Dean, he came around and he says "Captain, I want you to get ready to take your crew down to the *Admiral*

Halstead to take out some more gasoline, it is very important that we get that gasoline out".

Q. What did you say? A. We had come back very tired and almost done up. We had just cleaned up a little bit.

Q. Had you been working all night? A. We had been working all night, yes. It was red hot, way up to 105 and 110, almost impossible to sleep, and we had no sooner cleaned up before he came and wanted us to go back to work again. He said "I want you to be back on the *Admiral Halstead* by 4 o'clock". I says "Captain Dean, I am not going to take my crew down there tonight and I am not 1046 going to give orders that they are going down". He said, "Do you mean, Captain, that you refuse to do as I tell you?" I said "In this case, yes" so he left a few minutes afterwards, and two men came and took me out of the tent—they rounded up all my men, they made us move down to a plot staked out by one of Captain Dean's lieutenants, put four machine guns in the corners and told us not to get outside of those, not to get over the line there and Captain Dean came along, he said "All of you men that are willing to go to work you are released from arrest right now". He said "The rest of them will stay until they do work". There was two men went out, the second mate and the wireless operator, so I said "You two men you go up to the 1047 camp, you can't do no good on the ship". The rest of us was kept and we were there until we left Darwin.

Q. Were there any soldiers in that camp? A. Yes, sir.

Q. What were they doing while you and your crew were on the *Admiral Halstead* on the night of March 3rd and 4th? A. They were doing absolutely nothing.

Mr. Collins: Are we bringing suit for the work that the captain and his crew did in place of the Army? If not what is the purpose? It would be interesting but I think irrelevant.

Q. What were those soldiers doing on March 4th during the daytime when Captain Dean wanted your men to go

back to the *Admiral Halstead*? A. Well, there were so many of them I don't know what they were all doing but it seemed to me that they were not doing anything and I found out, and the crew also found out, that there was about 200 Australian longshoremen that was kept in a camp nearby that absolutely refused to work and that wasn't made to work.

Q. While you were under arrest there did you make any effort to reach the military authorities and persuade them to get you and your crew transported to Adelaide or to a
1049 Tidewater port where they could be sent home? A. Not while I was under arrest. Previous to being put under arrest I had seen everybody that could help me about being transported to the South Coast.

Q. In seeking transportation to the South Coast for you and your crew had you formed any judgment as to the possibility of salving the *Portmar* and recovering her, repairing her and restoring her to the same condition that she was in before the first attack in the Timor Sea? A. Yes, sir.

Q. What was your judgment as to the possibility of salving the ship, repairing her, restoring her to her former condition, and the cost of doing those things? A. My judg-
1050 ment was that such a thing under the conditions existing and prevailing was absolutely impossible.

Q. Was it in the light of that judgment that you endeavored to obtain transportation for your crew to Tidewater so that they could be sent home? A. Yes, sir, that was one of the reasons. One of the main reasons was that I wanted to get in touch with the owners, let them know what had happened. Before they arrested me I had seen everybody and I had even made them take telegrams from me that they faithfully promised they were going to send over the line to Melbourne and Sydney. I had sent telegrams to the American Consul in Sydney, I had sent telegrams to Bethlehem Steel ,because they would not let me address anything to Calmar Steamship Corporation—I

believe that was the Australians did not know about the Calmar Steamship.

Q. Wait a minute. Did all this occur while you were up there in Port Darwin? A. Yes, sir.

Q. Let me understand you: Did you send telegrams from Port Darwin to anybody? A. I handed the telegrams as I had written them over to Colonel LaRue.

Q. Do you know whether those telegrams were ever sent by Colonel LaRue? A. They were never sent.

Mr. Mount : We call for the production of copies of those telegrams if you have them. 1052

Q. Have you copies of those telegrams, Captain? A. No, sir, I have not.

Mr. Murphy: We haven't any copies of them so far as I know.

Q. When were you released from arrest, you and your crew? A. We were taken by military police from the place where we were kept under arrest down to the train that took us down to Durban.

Q. I asked when, what was the date? A. March 10th.

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Adjourned to August 1, 1945 at 10 A. M.

Met, pursuant to adjournment, August 1, 1945, 10 A. M.

Present as before.

AXEL MICHELSON resumes the stand.

Direct examination continued by Mr. Murphy:

Q. Captain, yesterday afternoon when we adjourned we had gotten down to the time you were kept in the military

1054 camp preceding your departure from Darwin. Before going ahead I want to go back for a couple of questions which I omitted to touch on. I believe you testified that when you went across the Timor Sea under convoy of the cruiser *Houston* you were under routing orders which you received from the Australian Naval Control officer at the convoy conference on board the *Houston* on the night before sailing. What did you do with those written orders for that sailing after you got back to Darwin? A. I turned them back to the Australian Naval Control.

1055 Q. Do you remember when you turned them back to the Australian Naval Control officer? A. No, sir. I think that I turned them back the same time I turned back my code books and directives.

Q. Where did you keep routing orders of that character? A. I kept them all over my person.

Q. Do you remember whether or not you got a receipt for those orders when you turned them in? A. No, sir, I thought the receipt for the written orders was included in the one you showed me yesterday.

Q. I show you the receipt which is Libellant's Exhibit 5 for identification and ask you to look at it and see if you can identify any of the entries in that receipt as covering

1056 the routing orders which covered the convoy across the Timor Sea? A. (Referring to Exhibit 5) No, sir, it is not mentioned here.

Q. Do you remember whether or not you got a separate receipt for those orders? A. No, sir, I don't believe I did, I don't remember I did.

Q. What was the tidal range at Port Darwin, that is the height of rise and fall of the water between low water and high water? A. It was a little different at different points in the harbor. Close to the mouth of the harbor it was the least.

Q. At the point where the *Portmar* lay beached what was the tidal range? A. I would say it was about 27 feet. There was a great difference of opinion even among the

experts and a real good tidal survey of the harbor had never been made.

Q. Well, your best recollection is that it was about 27 feet? A. Yes, sir, by my own observations. Will you pardon me a moment, Mr. Murphy, I believe I have some notes on the tide; I am not quite certain but I remember I put something down.

Q. All right, by all means look at them. A. (Referring to notebook) At the entrance to the Bay and near the shore all the way along the Darwin jetty was about 22 feet but this would increase as you went higher up the Bay and 1058
where the *Portmar* finally landed I would say it was 27, 28 feet.

Q. On the evening of March 3rd when you left the vessel what was your intention with regard to the ship? A. I had not at that time exactly formulated any intentions.

Q. Well, let me ask you this: When you left the vessel on the evening of March 3rd did you intend to return to the vessel? A. Yes, sir, the ship was mine and I intended to take care of her as long as possible.

Q. Before leaving Port Darwin on the 10th of March did you receive any paper from the Army Authorities regarding your unloading of the *Admiral Halstead*? A. 1059
Yes, sir.

Q. I show you a paper and ask you what that is? A. I had several times been to see the commanding officer, Colonel LaRue who wrote this letter, and asked him to give my crew transportation up to the South Coast of Australia so I could get them off my hands and he told me that he would do so as soon as it became possible. He told me also that he needed them badly to help get some of this gasoline ashore from the *Admiral Halstead.*

Q. Well, just confine yourself to the question. Just tell us what that paper is that you have got there? A. That is a thanks for the help that my crew gave getting the gasoline off the *Halstead.*

1060 Q. Is it a letter addressed to you by Colonel LaRue? A. Yes, sir.

Q. How did you get that letter? A. He give it to me himself.

Q. This letter is dated February 26, 1942. When did Colonel LaRue hand you this letter? A. I don't know any date. He handed it to me when they put us aboard the train.

Q. And when did they put you aboard the train? A. That was on the 10th of March.

1061 Mr. Murphy: I offer the letter to be marked for identification as Libellant's Exhibit 6.

It is so marked.

Mr. Collins: The letter was given to you on the date of the letter, February 26th?

The Witness: No, sir, the letter was given to me just when we boarded the train, a few minutes before. Colonel LaRue was there with the military police and an Australian, some officer, his name was Captain Degrucia.

Q. And on what date was that again? A. I think it
1062 was March 10th. Anyway it was the same date and at the same time as we were put aboard the train, which was almost done forcibly.

Q. Forcibly? A. Well, we were brought down to the train by the police, by the men that had kept guard over us.

Q. To the best of your recollection that was March 10th, is that right? A. Yes, sir, but that was the time—I know for a fact that was the time I got the letter from him. I didn't know until now you tell me it is dated February 26th, I didn't know, I never had taken a look at the date, but that is the time I got it, that's all I know.

Q. Up to the time you boarded the train had you been able to note a protest as to the events which had occurred prior to that date? A. No, sir.

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Q. Had you been able to send any word to your owners? A. No, sir. I had seen Colonel LaRue, they had accepted telegrams to the Consul General in Sydney, they accepted telegrams to Bethlehem Steel in New York, they had told me that the telegrams would be sent if it was possible.

Q. At that time did you know that any telegrams had actually gone through? A. I was not concerned about any other telegrams than my own.

Q. I am referring only to your own telegrams—did you know that any of your own telegrams had been transmitted to your owners? A. No, sir, I didn't know.

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Q. Had you received any instructions from your owners as to what you were to do? A. No, sir.

Q. When you boarded the train on March 10th with your crew what was your intention with regard to the *Portmar*? A. My intentions were to get in touch with my owners as quick as possible and tell them exactly what had happened, receive their instructions and carry out the instructions I got from them.

Q. On the 8th of April 1942 where were you? A. In Melbourne.

Q. Had you seen the *Portmar* at any time between March 3, 1942 and the 8th of April? A. No, sir.

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Q. As to the possibility of salvage, repair and restoration to former condition of the vessel on what factors was your judgment based as of the time you left Port Darwin on March 10, 1942? A. That it could not be done, that it was out of the question altogether.

Q. What were the reasons which led to that conclusion of yours? A. First the condition of the ship and the situation she was in. Moreover the military situation and the few resources available in Darwin, there was absolutely nothing, there was no facilities, there were no shops, there were no mechanics, there was no material of any kind. If anything had to be done to the ship the ship had to be moved out of Darwin. She was at the bottom of the sea part of

the time, more than half the time—the nearest port where anything at all could be done to her was two thousand miles away, she had to be towed through waters that was every day and every hour patrolled by the Japanese Navy and was absolutely dominated by the Japanese Navy and air force. If she finally got there to a port where there was any facilities there would not be enough of them, there was no drydock, no yards, there was no repair facilities, nobody in the country out in Australia had done any repair work to a ship, the British had always seen to it that that was
1067 done in England instead of Australia. They had no steel in Australia to do anything with, they had no men.

Q. How about the possibility of getting vessels to tow the *Portmar* from Port Darwin around to a port where even temporary repairs could be made? A. Well, I did not know of any and I could not see that there was any other way of doing it than let the British or Australian Navy do it but first the ship had to be raised, there wasn't even a pump in Darwin to raise her with. There was no way to use a pump unless you had steam to run it with.

Q. Are we to understand that there were no private towing vessels available so far as you knew? A. I didn't know every towing vessel there was in Australia. I knew
1068 that they were desperate for tow to take care of all the wrecks of all the ships that were wrecked along the coast. I knew that ships in the same fix, I mean ships that had been stranded or—they had to lay for weeks, sometimes for months, they even had to be left there altogether because they could not effect a few minor repairs and get them towed back to where possibly more repairs could have been made.

Q. How about the possibility of a Japanese invasion at Port Darwin? A. Well, that was impending every day, that was taken for granted by all the military authorities.

Q. Did you consider the cost that would be involved in salving and refloating the vessel, making her fit for a tow, the cost of towing her to a port for temporary repairs,

the cost of moving her to a port for permanent repairs where there was a drydock, the cost of the repairs themselves, the possibility of the amount of salvage charges that would be made if the vessel were raised, and similar items—did you consider those things? A. Yes, I did.

Q. How did they enter into your consideration? A. Well, I hardly know how to express myself but it struck me that those costs, if they could by some miracle be done, they would be so staggering that there was no common sense in it.

Q. Yesterday in answer to a question as to what your 1070
judgment was you said, if I remember rightly, that you considered that the possibility of salving, repairing and restoring the vessel to her former condition was out of the question, that it was impossible. Now, what did you mean by the word "impossible"? A. I don't know what I meant at the time. I did not mean it was impossible in a sense that it could not be done—anything can be done as long as you are willing to throw money and efforts enough out to get it done but it could not be done at a cost in my estimation that it was worth considering, even considering the value of a repaired ship in wartime.

Q. By that last remark did you mean that the cost of 1071
doing the whole job would exceed the value of the ship after you got the job done?

Mr. Mount: I object to that question.
Mr. Collins: Object to it as leading.

Q. All right, I will put it this way: What did you estimate the total cost of salving, towing, repairing and restoring the vessel to former condition would be in relation to the value of the ship after you got the job done? A. It would be several times the value of the vessel.

Q. That was your judgment on March 3, 1942? A. Yes, sir.

Q. Was it your judgment on March 10, 1942? A. Yes, sir.

1072 Q. Did you make any change in your judgment as of April 8, 1942 when you were in Melbourne? A. No, sir.

Q. No change in your judgment? A. No, sir.

Q. Just for the record, what was the nearest drydock to Port Darwin that could handle a vessel of the size of the *Portmar*? A. Sydney.

Q. Now, was it your intention to abandon the *Portmar* on March 3, 1942? A. No, sir.

Q. Was it your intention to abandon the *Portmar* on March 10, 1942 when you left Port Darwin on the train?

1073 A. No, sir, I never abandoned anything anywhere.

Q. Now, you said that among the factors you considered in reaching your judgment as to the possibility of salving, recovering and restoring the vessel to her former condition was the condition of the vessel as she lay. Now, will you please state in as great detail as you can what the condition of the vessed was as she lay on the beach at Port Darwin at the time you last saw her March 3, 1942? You can refresh your recollection from any material you have there. A. Well, there is a big fine ship laying at the bottom, weakened in her structure from fore to aft, which I know that she was. She was open to the sea, water was running in and out of her, she was almost full of water in her No. 5 hold,

1074 No. 4 hold, the engineroom, the boiler-room, the poop, the shelterdeck, the water that was running in and out of her was not water that could hardly be called water, it was more mud and muck and fuel oil than anything else. The whole Darwin Bay was covered with a film of—oh, it was more than a film because it was perhaps quarter of an inch thickness of fuel oil all over the Bay. Where she was there were several little creeks coming out muddying the water up. Wherever I looked, down the engineroom and fireroom or anywhere in the ship on a falling tide there was inches of mud laying around on anything and everything. Looking down the engineroom all the pipes were shattered and bare of covering. I knew from the engineer's report that the boilers had moved in their saddles and the auxiliaries had

moved in their foundations. I knew that all the quarters throughout the ship from forward to aft were demolished and broken up, shattered in all directions.

Mr. Mount: May I interrupt this a second. Now, I am not going to object to the master's telling what the engineer said he found——

Mr. Murphy: As an official report.

Mr. Mount: (Continuing) provided you will agree to put in a surveyor's report and Williams' testimony as to what was actually done and what was actually found. Otherwise I shall object to any 1076
testimony that the master gives about reports to him.

Mr. Murphy: Well, you may object but I will not agree to admit Williams' testimony. You will have to call him as a witness. I maintain that the master is entitled to testify to official reports he received from the chief engineer in the line of duty. You may note your objection.

Mr. Mount: I do note my objection and I give notice that I will bring this to the attention of the Court by motion. You have included in your claim against the underwriters the item of salvaging the vessel and I shall insist that no evidence be admitted 1077
as to that except by an exemplified copy of the record in the Court which granted the salvage award unless you will stipulate.

Mr. Murphy: We have not included in our claim against the underwriters an item of salvage of the vessel. We have included in our claim against the underwriters as for particular average if the abandonment was not valid, which we claim it was, the satisfaction of a decree of the Court of Australia—is that what you mean?

Mr. Mount: I say that you cannot and I will object to any proof of your item of satisfaction of a decree in Australia unless you produce an exemplified copy of that record and that decree.

1078 Mr. Murphy: Very well, but we have not come to that yet.

Mr. Mount: Well, I am giving you notice that unless you agree to that I will have to object to more of this testimony the master has been giving, and I have been very patient in letting him tell all about conditions all over Australia, and that stops unless you will tell me now that you will admit the surveys of the vessel and testimony of Williams as to what was done in the salvaging of the vessel, and an exemplified copy of the record in the salvage suit.

1079 Mr. Murphy: The surveys of the vessel I intend to put in myself. I will not admit Mr. Williams' testimony given in another action. I maintain as to the original point that you opened up with in this discussion that the master is entitled to testify to official reports made to him by the chief engineer in line of duty.

Mr. Mount: No, I won't agree that the master is entitled to state what the conditions in the engine-room were.

Mr. Murphy: He is certainly entitled to say what he saw.

1080 Mr. Mount: He is, but he has already testified, as I recall it, that he did not go in the engineroom or at least if it was not that, that he knew very little about the engineroom.

Mr. Murphy: He has not testified that he did not go in the engineroom.

Mr. Mount: I won't insist because I am not sure, but he certainly said he knew very little about the engineroom.

Mr. Murphy: Well, the record will show whether he said that.

Mr. Mount: Yes. Now, let me get this clear: You intend to introduce in evidence the surveys of the vessel?

Mr. Murphy: Yes.

Mr. Mount: That will be the joint survey made at Melbourne?

Mr. Murphy: Yes, all the surveys except Lloyd's surveys which do not concern us.

Mr. Mount: And you state that you will not stipulate the testimony of Mr. Williams?

Mr. Murphy: By all the surveys I mean I will introduce the surveys which were made at our instance. You of course can introduce the surveys made at yours. 1082

Mr. Mount: Well, wasn't the survey at Melbourne a joint survey in which all joined?

Mr. Murphy: Yes. I have no objection to that going in. You will probably introduce that. No, the joint survey was made at Sydney.

Mr. Mount: Yes.

Mr. Murphy: As to that survey, we all know about it. You will introduce it and I won't object to it. I will introduce the surveys made at Brisbane at our instance, yes, and when I come to it I will undoubtedly introduce the decision of the high Court making the salvage award because that goes to particular average and I shall prove that we satisfied that 1083 award, but I will not consent that Mr. Williams' testimony be made testimony in this case, so that you have full notice of that now.

Mr. Mount: I am glad I have.

Mr. Collins: I move to strike out that part of the captain's testimony relating to what the chief engineer is alleged to have found in the engineroom and what he is alleged to have reported to the captain as being hearsay, the best evidence being that of the chief engineer himself. I think a great deal of latitude has been permitted in allowing the captain to testify as to matters which he may or may not have had any personal knowledge of at all. I assume the Court

will give such testimony the weight it is entitled to, if any.

Mr. Mount: To make it clear, I move that the master's answers as to what happened in the engineroom based on what the engineer said to him be stricken out.

Mr. Murphy: For the reasons stated I oppose that motion.

Q. All right, Captain, go ahead, resume. A. All the 4 and 5 holds were full of water and mud and muck, all the
1085 ceiling, tank tops, all the woodwork and hatches in No. 4 and 5 hold were floating around and away at high water, the standing and running rigging of the ship had more or less been shattered and cut to pieces by cannon and shrapnel fire, all the navigating equipment of the ship was gone, there wasn't a thing left, ice machine and all the refrigerating machinery was demolished by shrapnel, the ship's machine shop and all tools, benches, facilities for making repairs in the engineroom was demolished and shattered, had disappeared, there were none of the boatswain's stores, carpenter's stores or mate's stores or engineer's stores left anywhere, the ship was laying at the bottom of the sea and
1086 had to be raised before anything could be done to her in the line of repair whatsoever.

Q. In that connection, what effect did the rise and fall of the tide have on the ship? A. It had the effect that the aft end of the ship was stuck in mud and did not rise and fall with the tide whereas the forward end of the ship raising and falling twenty some feet at every raise and fall of the tide was tending more or less to strain the ship, more for every tide that she was there.

Q. All right, Captain, you got as far as the rigging being shot away—go ahead. A. There was no equipment or tools left aboard the ship to help in the re-floating of her else I realized that it could be done if such equipment had been available but the nearest that could be had was to be taken

three thousand miles through the desert of Australia. There was no possibility of getting it anyway because there was no access to Darwin Harbor on account of the Japanese.

Q. How about the condition of the crew's quarters aft in the poop? A. Well, there wasn't anything left of the crew's quarters. There was just the shell left aft there, everything was busted away and demolished and washed away.

Q. How about the midship accommodations? A. The same thing, there was just the torn shell enclosure and that was all because there was nothing left in the line of partitions between the rooms—bulkheads, everything was gone. 1088

Q. What was the condition of the decks? A. The decks were perforated from fore to aft by machine gun fire. That included winches and steam pipe, steam line, the smokestacks, ventilators, engineroom skylight, fireroom skylight.

Q. What was the condition of the cargo booms? A. There were only one or at the most two cargo booms that had not been shot through or splintered by machine gun fire. All the rigging, running and standing, more or less had to be replaced.

Q. What was the condition of the radio house? A. The radio house was blown off its foundations, all the instruments were busted or had been taken out or had disappeared. 1089

Q. Was the condition of the standard and steering compasses the same as you have already described? A. Yes, there was just pieces left of it.

Q. What about the poop mooring telegraph and sounding machine? A. The poop was demolished, shot, had been torn out, the sounding machine had disappeared, been shot off, I believe there was a piece left of the column—engineroom telegraph from the poop was demolished.

Q. What about the telemotor piping? A. The telemotor piping was bent and I believe perforated, broken in places.

Q. Lifeboats, what about the condition of your lifeboats? A. No lifeboats left, they were all gone, they all disappeared.

Q. Now, as to the condition of the shaft alley, were you able to get into the shaft alley and see that? A. No, sir.

Q. How about the internal condition of the engines, could you determine that?

Mr. Mount: I object to that. The master is not an engineer. You can call the chief engineer if you want to.

Mr. Collins: I join in that objection.

Q. Answer the question please. A. I am not an engineer
1091 but it would not take an engineer to see that it would take weeks and possibly months of repair to make the engines fit to ever run again. I have gone to sea a good many years and I have been in steamships for more than thirty years. I am not wholly ignorant of what can be done with a ship's engines.

Q. Was there any damage to the electric wiring in the ship? A. It was practically non-existent, torn up and blown up, had been torn out when the quarters were demolished when concussions struck them.

Q. When did you next actually see the *Portmar* after you last saw her at Port Darwin on March 3, 1942? A.
1092 That was way into the summer in late July, the following summer.

Q. At what port? A. Brisbane.

Q. When did you arrive at Melbourne after leaving Port Darwin March 10, 1942? A. March 22nd.

Q. What did you do first? A. First I took care of my crew.

Q. What day of the week was March 22, 1942? A. That was a Sunday.

Q. Did anyone meet you at the train at Melbourne on arrival? A. There was no one met us but shortly after we had arrived and I had arranged to have the crew taken up in a military camp the American Consul, Mr. Hunt, arrived.

Q. Where did he arrive when you first saw him? A. Well, he was asking for the master of the *Portmar* and somebody pointed me out.

Q. I said where were you when you first saw him? A. On the station.

Q. At the railroad station? A. Yes, sir.

Q. Did Mr. Hunt, the American Consul, go with you to the military camp? A. Yes, he told me about——

Q. No, don't say what he told you in view of the objections made here—just answer the question. (Repeated.) Did Mr. Hunt, the American Consul, go with you to the military camp? A. Yes, sir. 1094

Q. Did you tell Mr. Hunt that you wanted to note a protest? A. I gave him a short condensed picture of what happened.

Q. Answer the question, please. (Repeated.) Did you tell Mr. Hunt that you wanted to note a protest? A. I believe I did.

Q. Did you note the protest on Sunday, the day on which you arrived there? A. No, sir.

Q. Did you see Mr. Hunt, the American Consul, on Monday, March 23rd? A. Yes, sir.

Q. Did you note the protest with the American Consul on March 23, 1942? A. No, sir. 1095

Q. I show you a paper and ask you what that is? A. This is a protest.

Q. Is this the first protest you noted? A. No, sir.

Q. Which was the first protest that you noted? A. The first protest I noted was noted before a notary public, Mr. Hamilton, in Melbourne.

Q. I show you four papers, an original protest dated March 23, 1942 before the American Consul, an extension of that protest dated March 25, 1942 before the American Consul, a note of protest before a notary, Edward James Hamilton, dated March 27, 1942 and an extension of that protest before the notary, Edward James Hamilton, dated March 27, 1942—now, look at those papers and tell

us the order in which you made those protests. A. The protest noted before the notary, Mr. Hamilton, was the first one I noted.

Q. And what was the next one? A. That was extended later on, that was the next. The other two were later on noted before the American Consul and ante-dated or dated back.

Q. Did you ask Mr. Hunt, the American Consul, on March 23rd to take your protest? A. Yes, sir.

Q. Did he take it on that date? A. No, sir.

1097 Q. Why not? A. Because they were so busy in the Consulate that it was an absolute impossibility for them to take my protest. They had hundreds of American ship-wrecked sailors and men around that mostly were in bad straits and had to be taken care of immediately.

Q. What did the American Consul tell you to do? A. He told me to go to a notary and get a note of protest as soon as possible and he said "Captain, when this rush is over and I get those men taken care of I will take care of your protest and there isn't anything going to happen out of the way because I cannot note your protest today."

Q. After that did you go to the notary, Edward James
1098 Hamilton, and note the protest and the extended protest dated March 27, 1942? A. No, sir, after that I went over and hired an agent.

Q. We will come to the agent again. What I mean is with respect to protests, was the next thing you did to go to the notary, Edward James Hamilton, and note your protest and extension of protest both dated March 27, 1942? A. Yes, sir.

Q. And then did you take those protests back to the American Consul after that? A. Yes, sir.

Q. And did the American Consul prepare the protest dated March 23rd? A. I beg your pardon, I did not take them back to the American Consul, I went up to the American Consul and noted protest there too.

Q. You went to the American Consul and noted protest and extension of protest? A. Yes, sir.

Q. And those were dated back to March 23rd and March 25th respectively? A. He asked me if I had noted protest before anybody else and I told him I had done as he told me, I had noted before a notary, and he asked to see them.

Q. And did you give him the copies of the protest and extension of protest which you noted before the notary? A. I showed them to him, yes, sir.

Q. After that did he note your protest of March 23rd and your extension of protest of March 25th? A. Well, he 1100
examined me and my crew and found out that the facts as stated in those protests of Mr. Hamilton were actually the facts and I believe his protests were worded very much the same after he had found out that such was the case.

Mr. Murphy: I ask that these protests be marked for identification as follows: Profest noted before the American Consul March 23, 1942 as Libellant's Exhibit 7 for identification; extension of protest before the American Consul dated March 25, 1942 as Libellant's Exhibit 8 for identification; protest noted before Edward James Hamilton, notary public, dated March 27, 1942, as Libellant's Exhibit 9 for identifi- 1101
cation; extension of protest noted before Edward James Hamilton, notary public, dated April 2, 1942, as Libellant's Exhibit 10 for identification.

They are so marked.

Q. Now, Captain, you said a moment ago that you hired an agent when you got to Melbourne. Who was that agent? A. Dalgety & Company.

Q. Did you consult anybody about what agent to hire? A. Yes, I believe I told Mr. Hunt that I would like to get Dalgety if they were in town. He said that Dalgety would be just about the best agents I could hire in Melbourne.

Q. After you got to Melbourne did you succeed in sending a cable to your owners? A. I told Mr. Hunt that I had

to get in touch with my owners. He told me that that would be very important.

Mr. Collins: I object to what Mr. Hunt said and move to strike it out.

Q. Just answer the question, Captain. (Repeated) After you got to Melbourne did you succeed in sending a cable to your owners? A. Yes.

Q. I show you a copy of a cable dated Melbourne, March 24th, and ask you if that was the message you sent? A. Yes,
1103 sir.

Mr. Murphy: I ask that it be marked for identification.

The cable is marked Libellant's Exhibit 11 for identification.

Q. Now, this cable tells nothing about the disaster or the particulars of the disaster. Was there any reason why you did not put in this cable a statement of the facts of the bombing and the position of the vessel? A. Yes, sir.

Q. What was the reason? A. They made me believe that my owners knew everything about it. The American
1104 Naval Attache, Captain Causey, he told me to keep the telegram down to the least possible number of words.

Q. Is that the American Naval Attache? A. Yes, sir.

Q. Was that the reason for the brevity of this cable? A. Yes, sir.

Q. Have you among your papers any communications from the American naval authorities at Port Darwin regarding the condition of the *Portmar,* or perhaps I had better ask you this question: Does that letter you hold in your hand come from your own file or have you seen it before? A. I have never seen it before.

Q. All right, let me have it.

(Witness hands the letter to Mr. Murphy).

1105

Mr. Murphy: I offer for identification a letter on the letterhead of the United States Maritime Commission to Mr. H. W. Warley, President, Calmar Steamship Corporation, dated April 3, 1942, signed by Mr. James G. Outler, Ship Control Section, War Shipping Administration, as Libellant's Exhibit 12 for identification.

It is so marked.

Mr. Collins: I admit the authenticity of the letter but object to it on other grounds, including the particular objection that the comments as to the condition of the vessel are pure hearsay, not admissible as evidence.

1106

Mr. Mount: No objection.

Q. Captain, did you get a reply to your cable of March th which is now Libellant's Exhibit 11? A. Yes, sir.

Mr. Murphy: I offer for identification copy of cable from H. W. Warley, President, Calmar Steamship Corporation, to Axel Michelson, dated March 27, 1942.

Mr. Mount: I will object to all but the first sentence of that cable as being a self-serving declaration, immaterial as far as the master and his actions were concerned and merely an attempt to prove by something less than the best evidence what is contained in the rest of the cable. I have no objection to the first sentence up to the word "Stop".

1107

Mr. Murphy: First of all, on or about July 23, 1945 Mr. Mount served on this firm a notice to produce calling on us to produce all cables, letters, reports, messages, statements and writings sent or received and all marine protests made, noted or extended by the master and the chief officer of the *Portmar*.

Mr. Mount: Correct.

1108 Mr. Murphy: This cable is within that call. Next, Mr. Mount objected on the ground of the best evidence rule. Do I understand that you object to this on the ground that this is just a file office copy, libellant's office file copy, rather than the actual paper received by the ship master in Melbourne?

Mr. Mount: No, I object to it on the matter of substance, not on the fact that this is a copy.

Mr. Murphy: Not on the best evidence rule?

Mr. Mount: Well yes, on the best evidence rule that you have a witness here in New York who can

1109 testify as to the latter part of the cable.

Mr. Murphy: Then we understand that you do not object on the ground that it is not the actual paper received by the master in Melbourne?

Mr. Mount: No, if Mr. Groom tells me that that cable was sent, that is good enough for me.

Mr. Murphy: Does Mr. Groom tell you that?

Mr. Groom: Yes.

The copy of cable is marked Libellant's Exhibit 13 for identification.

Q. Captain, while you were in Melbourne did you hire

1110 a firm of lawyers to represent the *Portmar* and her owner? A. Yes, sir.

Q. Whom did you retain? A. Malleson Stewart.

Mr. Mount: What is that?

Mr. Murphy: Malleson Stewart & Company, solicitors, Melbourne.

Q. When did you consult them, if you remember—just give me the date. A. I couldn't tell you the exact date.

Q. Was it in the first week you were there? A. Yes, sir, certainly within the first week, it was one of the first days.

Mr. Murphy: I offer the cable sent by Malleson Stewart & Company, solicitors, to Calmar, Bethle-

hem Steel Corporation, dated Melbourne, March 30, 1942, to be marked for identification as Libellant's Exhibit 14 for identification.

It is so marked.

Q. Now, Captain, in the cable marked Libellant's Exhibit 13 Mr. Warley, President of libellant, asked you for the itinerary of the ship since leaving the United States. Did you answer that cable?

Mr. Mount: I object to that on the same grounds as my previous objection to the cable itself. 1112

A. Yes, sir.

Q. Is that your reply to that cable, Libellant's Exhibit 13 (handing witness paper)? A. Yes, sir.

Mr. Murphy: I wish to state that in my previous remark which was objected to by Mr. Mount, we are only going over all the ground which he demanded be covered by production of all the documents in his notice to produce.

Mr. Mount: Yes, but I did not demand that they all be introduced or stipulate that they were all relevant or admissible. 1113

Mr. Murphy: Very well. I offer for identification cable sent by Captain Michelson to libellant dated Melbourne, April 1, 1942.

It is marked Libellant's Exhibit 15 for identification.

Q. Captain, there has been question here as to the cable you received on March 27th, Libellant's Exhibit 13. It begins with the words "Your 23rd 24th". Mr. Mount has suggested that that may refer to two cables which you sent to Calmar. I wish to ask you whether prior to receipt of Libellant's Exhibit 13 March 27th you sent any other cable except Libellant's Exhibit 11 dated Melbourne,

1114 March 24th—was there any other cable that you sent except this one before you got Mr. Warley's cable of March 27th? A. No, sir.

Q. I show you another cable dated Melbourne, April 6th, and ask you if you sent that cable to libellant? A. Yes, sir.

Mr. Murphy: I offer that cable to be marked for identification.

It is marked Libellant's Exhibit 16 for identification.

1115 Mr. Murphy: I offer for identification cable sent by libellant to Malleson Stewart & Company dated April 7, 1942.

It is marked Libellant's Exhibit 17 for identification.

Q. I show you, Captain, a copy of cable sent by Mr. Warley, President of Calmar Steamship Corporation, to you dated April 10, 1942 and ask you if you received that message at Melbourne? A. Yes, sir.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 18.

1116 It is so marked.

Q. I show you a cable dated Melbourne, April 13, 1942, sent by you to Calmar Steamship Corporation—did you send that cable? A. Yes, sir.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 19.

It is so marked.

Q. I show you copy of cable addressed to you by Mr. Warley, President of Calmar Steamship Corporation, dated April 16, 1942 and ask you if you received that message? A. Yes, sir.

Mr. Murphy: I offer this cable for identification as Libellant's Exhibit 20.

It is so marked.

Q. I show you a hand-written letter apparently written by you to Mr. Warley, President of Calmar Steamship Corporation, dated Melbourne, April 17, 1942, and ask you if that letter is in your handwriting and if that is your signature at the foot of that letter? A. Yes, sir, I wrote that letter.

1118

Mr. Murphy: I offer for identification hand-written letter by Captain Michelson to Mr. H. W. Warley, President of Calmar Steamship Corporation, with for convenience a typewritten copy attached.

It is marked Libellant's Exhibit 21 for identification.

Q. How did you send this hand-written letter which is Libellant's Exhibit 21 for identification? A. I sent that home with one of my men that had been wounded and had been in the hospital and as a consequence he was too late to be sent home with the rest of the crew. He reported to me later on and when I got a ticket for him and got my message to send him home I asked him to take this along with him.

1119

Q. Was he the last of your crew to leave Australia except yourself? A. I believe so.

Q. Between the time when you completed noting your protests and the time you next saw the *Portmar* as you have already testified at Brisbane, what did you do in Melbourne with regard to the *Portmar*? A. I tried to keep in touch with what happened to the *Portmar* from day to day and I more or less succeeded in having an idea of practically right along what was happening. I kept in touch with my attorneys every day and consulted them.

I kept in touch with the American authorities such as the Consul and the American Naval Attache, Captain Causey.

Q. Did you try to get permission and transportation back to Port Darwin and the *Portmar*? A. Yes, sir.

Q. Did you succeed in that? A. No, sir.

Q. Did you receive any information while you were in Melbourne there that the ship had been re-floated? A. Yes, sir.

Q. Captain, I show you a cable sent by you to Calmar Steamship Corporation dated April 20, 1942—did you send
1121 that message? A. Yes, I did.

Mr. Murphy: I offer it for identification as Libellant's Exhibit 22.

It is so marked.

Q. I show you a copy of a cable from Mr. Warley, President of Calmar Steamship Corporation, to you dated April 21, 1942 and ask you if you received that message in Melbourne? A. Yes, sir, I received that cable.

Mr. Murphy.: I offer it for identification as Libellant's Exhibit 23.

It is so marked.

1122 Q. Now, Captain, I show you two cables, one to you from the shipowner, libellant, dated April 24, 1942 and one sent by you to the shipowner dated Melbourne, April 25, 1942. Now, which occurred first? Did you send the cable or did you receive the other cable first—just give us the order in which those things happened. A. I believe I sent this before I received that one (indicating).

Q. You now refer to your cable to Calmar Steamship Corporation of April 25th? A. Yes.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 24.

It is so marked.

Mr. Mount: We do not object to this exhibit for identification as proof of a message sent. We do

object to its being accepted as proof of the statements contained therein.

Mr Collins: I take the same position and make the same objection.

Q. Now, Captain, in this cable which is marked Libellant's Exhibit 24 for identification, you started in by saying to your shipowner, answering Mr. Warley's cable of April 21st, that you were "assured previous understanding Army asserting ownership misapprehension". Who assured you of that? A. Colonel Plant in charge of American Sea 1124
Transport in Australia.

Q. Was that Colonel T G Plant? A. That is the former Vice President or President of the American-Hawaiian Steamship Corporation.

Q. Then the word "Stop" appears. Now, the next part of the message begins: "Diver's report follows quote". Now, that is the beginning of the diver's report, isn't it, from that word "Quote"? A. Yes.

Q. And then——

Mr. Mount: Don't read it into the record. Show it to him and ask him about it.

1125

Q. How far does the diver's report run in that cable? A. That is the diver's report (indicating on Exhibit 24).

Q. Where does it start—there (indicating)? A. Yes.

Mr. Murphy: I will put a red ring around the word "Quote".

Q. Now, how far does the diver's report go? A. Down to the word "Quote" again there (indicating).

Q. Down to the words "End quote", is that it? A. Yes.

Mr. Murphy: I will put a red ring around the words "End quote".

Q. That is the end of the diver's report, is that it? A. Yes, sir.

1126 Q. Where did you get that information? A. I believe I got that in Colonel Plant's office.

Q. Did I understand you to say that you saw a telegram? A. Yes, sir, I did.

Q. Where did you see that telegram? A. It was either in Colonel Plant's office or else it was Lloyd's agent, Mr. Sargent, in Melbourne.

Q. Now, from there on after the words "End quote" you say "Government Salvage Board officer now agrees" and then the following. Now, tell us where the agreement with your views of the Government Salvage Board officer
1127 ends—how far down should we read there as being what the Government Salvage Board officer agrees to? A. The word "Stop" there (indicating).

Mr. Murphy: I will put a blue ring around the word "Stop".

Mr. Mount: Is that the "Stop" after "Towing"?

Mr. Murphy: No, after the words "Perforated bottom".

The Witness: Yes. Mr. Williams told me that it had a perforated bottom.

Mr. Collins: I object to that and move to strike
1128 it out.

Mr. Mount: I make the same motion.

Q. After that word "Stop" the cable begins with the word "Informed takes six inch pump" and so forth—what is the basis of that information? A. That is the information I got from Captain Williams of the Salvage Board, direct information that he gave me face to face.

Q. How far does that information go in this cable, how far should we read that cable as being based on Captain Williams' statements to you? A. To the word "Stop".

Q. To the word "Stop" after the word "Flow"? A. Yes, sir.

Mr. Murphy: I will put a blue diagonal line after that word "Stop".

1129

Q. Now the words "Nearest drydock where ship was New Year stop", was that on information or was that your own statement? A. That was my own statement but it was information which I had gotten from the Lloyd's agent, Mr. Sargent, because I went up to him one morning and asked him to tell me where the nearest drydock was that would dock the *Portmar* and he told me there was some little dock above the drydock they had in Newcastle which was a few miles nearer. He finally looked it up and he made certain she could not dock in Newcastle on account of the dimensions of the ship.

1130

Q. How about the next statement "Tow difficult and risky"? A. That is mine.

Q. Now, the next statement as to the wartime powers of the Salvage Board, is that your statement or is that made on information you got from someone else? A. That is my statement made on information that I got from my solicitors.

Q. Now the next statement that the "Board has requested lease lend authorities finance salvage", where did you get that information? A. I heard myself personally in Sir Owen Dixon's office and later on I had it confirmed by information that I very likely got through my agents and solicitors.

1131

Mr. Mount: It is understood that our objection applies to each one of these.

Mr. Murphy: Yes, wherever applicable you object as hearsay.

Q. The next statement "Understand only concern lease lend and American Army recondition ship for use however desirable", what is the basis for that statement? A. Information obtained either directly from the American Army in Colonel Plant's office or else through my solicitors.

Q. The next statement is that the "Board advises two tugs necessary but doubtful any available". Where did you get that information? A. Lloyd's agent, Mr. Sargent, Manager of the Oriental Steamship Company.

1132 Q. The next statement "Is also doubtful whether dock available for several months stop"—what is the basis for that statement? A. I am not quite certain. I believe that was information I got through Dalgety's firm in Sydney.

Q. The next statement "No decision future action yet made", what is the basis for that statement? A. Well, that is undoubtedly a statement I made myself from the way things were and the situation was at that time.

Q. The next statement "Salvage Board will claim salvage reward for raising if ship finally recovered", what
1133 was the basis for that statement? A. The basis for that statement was a statement that Captain Williams had made at a meeting held down at Dalgety's where everybody concerned was present.

Q. Was the War Shipping Administration represented at that meeting? A. Yes, sir.

Q. By whom? A. The War Shipping Administration was represented by Mr. Watson of Dalgety and also by Chief Engineer Flannagan which they had hired from Matson Company in San Francisco.

Q. Were Lloyd's represented at that meeting? A. Yes, sir, Mr. Sargent was there.

1134 Mr. Collins: What was the date of the meeting?

—The Witness: I am sorry, I couldn't tell you, I don't remember.

Q. This meeting was held in Melbourne, was it? A. Yes.

Q. The next statement: "If facilitated by Army could return location twelve days stop", was that your own statement to your owner? A. That was my own statement because I was everlastingly trying to get back to Darwin. I tried time and again to get permission to go to Darwin and help to get there and the Army blocked me at every step, they did not want that.

Q. The next statement is "At present can do more here stop". That is your own statement? A. Yes, sir.

1135

Q. The next statement is "Mate and chief arriving soon". Was that your own statement? A. Yes, sir, that was meaning that the chief engineer and the chief mate whom I had sent home with the crew, they would arrive in New York soon and they would be able to give better information to the owner than I could do in a short cable.

Q. Finally "If shown telegrams could supply full information". You mean by that if shown to the mate they could give full information? A. Yes, if shown the cables they could explain a lot of things I couldn't.

1136

Recess taken to 2.15 P. M.

After Recess, 2.15 P. M.

Present as before.

Axel Michelson resumes the stand.

Direct examination continued by Mr. Murphy:

1137

Q. Now, Captain, here is a telegram dated April 24th from Mr. Warley to you. Will you look at that and tell me if you received that message while you were at Melbourne? A. I am fairly certain I did but I don't remember that I received this special telegram. There is but little doubt about it that I did but I don't remember that one.

Q. In any event, was it received before or after you sent the telegram April 25th which is Libellant's Exhibit 24, which begins "Yours twenty-first"? A. This is undoubtedly (referring to Exhibit 24) an answer to that one there (referring to Exhibit 23).

Q. Libellant's Exhibit 24 is an answer to Libellant's Exhibit 23 which is Mr. Warley's cable of April 21st? A. Yes, sir.

1138 Mr. Murphy: I am willing to offer this to be marked if you wish it. I don't think it is needed in the record.

Mr. Mount: It is not necessary.

Mr. Collins: No.

Q. I show you a cablegram dated April 28, 1942 and ask you if you sent that cable to Calmar Steamship Corporation? A. That's right, I sent that.

1139 Mr. Murphy: I offer it for identification as Libellant's Exhibit 25.

It is so marked.

Q. After your cable of April 28th did you continue to try to keep in touch with the situation regarding the *Portmar* at Port Darwin? A. Yes, sir, I did.

Q. Will you tell us whether you were able to get information as to what was going on at Port Darwin? A. Yes, sir, I was able to get reliable information right along.

Q. On May 22nd did you send this message to Calmar Steamship Corporation (handing witness paper)? A. Yes, sir.

1140 Mr. Murphy: I offer that telegram for identification.

It is marked Libellant's Exhibit 26 for identification.

Q. And did you also send this message on May 27th, Captain (handing witness paper)? A. Yes, sir.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 27 for identification.

Q. And did you also receive this message from Mr. Warley of Calmar Steamship Corporation dated May 26, 1942? A. Yes, sir, I did.

Q. Did you receive that message before or after you sent Libellant's Exhibit 27? A. I received this after I had sent that one there (indicating).

Mr. Murphy: He said "I received this" indicating the new cable, after he sent Libellant's Exhibit 27. I offer for identification this cable of May 26th from Mr. Warley to Captain Michelson.

It is marked Libellant's Exhibit 28 for identification.

Q. In this cable, Captain, now marked Exhibit 28 for 1142
identification you were asked to remain until after proposed inspection and survey of vessel in drydock probably at port where she was January 1st. Where was the *Portmar* on January 1st? A. Sydney.

Q. Prior to receiving this cable, Libellant's Exhibit 28, did you have any information that the vessel was going around to the East Coast of Australia? A. Yes, sir.

Q. What was it? A. Such information as I could pick up around Melbourne, some of it very good information though and received from good sources.

Q. When did you first learn so far as you remember that the *Portmar* had been floated at Port Darwin? A. 1143
That was on the 13th of April.

Q. Did the fact that the *Portmar* was afloat again change your judgment as to the possibility of complete salvage of the vessel, repair of the vessel and restoration to the condition she was in before the first bombing attack in the Timor Sea?

Mr. Mount: I object to the question as leading.

A. Not one bit.

Q. Did the fact that you learned on April 13th that the vessel was afloat again at Port Darwin have any effect at all on your judgment as previously expressed as to the possibility of salving, recovering and restoring the *Portmar* to her former condition?

Mr. Mount: Same objection, same ground.

1144 *Deposition of Axel Michelson—Direct.*

A. None whatever.

Q. When you received the owner's cable instructing you to remain, Libellant's Exhibit 28, did you make a reply? A. I believe I did.

Q. Will this refresh your recollection on that (handing witness paper)? I show you a cable dated May 27th from you to Calmar Steamship Corporation. A. Yes, I sent that to them.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 29 for identi-

1145 fication.

Q. I show you a copy of a cable from Mr. Warley, President of the Calmar Steamship Corporation, to you dated June 27, 1942. Did you receive that message? A. Yes, sir, I received it.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 30 for identification.

Q. Now, in this cable message of June 27th, Libellant's Exhibit 30, you were informed that the vessel was en route

1146 to the port where she was January 5th. What port was that? A. Brisbane.

Q. Did you reply to that cable? A. Yes, sir.

Q. Is this cable signed by you to Mr. Warley, President of Calmar Steamship Corporation, your reply to Libellant's Exhibit 30? A. Yes, sir.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 31 for identification.

Q. Did you make inquiries as to when the vessel might be expected to arrive at Brisbane? A. Yes, sir.

Q. What information did you get? A. I was able to keep in touch with the movements of the *Portmar* almost from the time she left Darwin until she arrived in Brisbane.

Q. How did you do that? A. Well, directly through Lloyd's agent, Mr. Sargent—I would go in there every morning, see Mr. Sargent.

Q. Was Mr. Sargent Lloyd's agent at Melbourne? A. Yes, sir.

Q. Did you subsequently leave Melbourne to meet the ship at Brisbane? A. Yes, sir.

Q. I show you telegram of July 1st from you to Mr. Warley, President of Calmar Steamship Corporation. Did you send that message? A. Yes, sir.

Mr. Murphy: I offer it for identification. 1148

It is marked Libellant's Exhibit 32 for identification.

Q. Captain, in this cable you say "Send three each deck engine and official logs". What did you mean by that? A. I asked them to send three blank logs of each kind because I was aware that my logbooks would be taken away from me when Court action was started and I wanted to make copies of them. I had also been notified that they found old engineroom logbooks up at Darwin and I had been told that if they arrived and if they came from Melbourne I would be given access to them so I could see them. That 1149 was why I asked for three blank deck logs and three blank engineroom logs.

Q. You wanted to make copies of the logs? A. I wanted to make copies of those logs on the desk, yes. I later on received just exactly what I had asked for.

Q. I have here what appear to be the smooth deck logs of the *Portmar* from November 20, 1941 to January 20, 1942 and from January 21, 1942 to February 19, 1942, also a photostat copy of the official log of the *Portmar*, entries running from February 15, 1942 onward. First as to the deck logs, are these the original smooth deck logs of the *Portmar*? A. Yes, sir, they are.

Mr. Murphy: I ask that they be marked for identification. Counsel have already seen these logs.

1150 Logbook of November 20, 1941 to January 20, 1942 is marked Libellant's Exhibit 33a for identification; logbook of January 21, 1942 to February 19, 1942 is marked Libellant's Exhibit 33b for identification.

Q. I now show you a photostat of what appear to be pages of the *Portmar's* official log from February 15th onward and ask you if those pages are in your handwriting? A. Yes, that is from the official log, all in my own handwriting.

1151 Mr. Murphy: I am informed that the original official log is in the files of the Shipping Commissioner at San Francisco. This photostat copy has been sent to us by Calmar Steamship Corporation. I ask that it be marked for identification. It has already been inspected by opposing counsel.

It is marked Libellant's Exhibit 34 for identification.

Q. Now, Captain, I show you a copy of a cable addressed to you by H. W. Warley, President of Calmar Steamship Corporation, dated July 20, 1942 and ask you if you received 1152 that message? A. Yes, sir, I received that.

Mr. Murphy: I offer that for identification as Libellant's Exhibit 35.

It is so marked.

Q. And did you send this reply to that last exhibit (handing witness paper)? A. Yes, sir.

Mr. Murphy: I offer the reply for identification.

It is marked Libellant's Exhibit 36 for identification.

Q. When did you leave Melbourne to meet the vessel at Brisbane? A. July 27th.

Q. When did you get to Brisbane? A. July 29th.

Q. What time of day? A. 4 or 5 o'clock in the afternoon.

Q. Was the ship there when you got to Brisbane? A. She had docked at a place called Tinkenba about noon the same day, so I was informed.

Q. Did you see the vessel there on the 29th when you got to Brisbane? A. No, sir.

Q. Did you employ surveyors to represent the shipowner and make an examination of the vessel? A. Yes, sir.

Q. Whom did you employ? A. Captain Douglas Taylor and his engineer assistant, a Mr. Horn. Mr. Horn was 1154
lieutenant commander in the Australian Royal Navy.

Q. Do we understand that he was a regular Navy officer or in the Naval Reserve? A. He was in the Naval Reserve.

Q. Did you employ them orally or in writing? A. I went down and spoke to them, but to make them official I thought I better do it in writing and I did so later on.

Q. I show you a letter and ask you if you wrote that letter? A. Yes, sir, I wrote it.

Mr. Murphy: I offer Captain Michelson's letter to Captain Douglas Taylor dated August 1, 1942 for identification.

It is marked Libellant's Exhibit 37 for identification. 1155

Q. Did you receive a reply from Captain Douglas Taylor? A. I did.

Q. Is that the reply, that letter of August 4th to you signed by Douglas Taylor (handing same to witness)? A. Yes, sir, that is the reply.

Mr. Murphy: I offer that for identification.

It is marked Libellant's Exhibit 38 for identification.

Q. Captain, before you left Melbourne did you take any steps to get permission to get on board the vessel when you got to Brisbane? A. Yes, sir.

1156 Q. Did you apply to anyone for a pass? A. Yes, sir, I went up and saw Colonel Plant.

Q. Did Colonel Plant give you a pass? A. Yes, sir, he did.

Q. Is that paper you hold there the pass that Colonel Plant gave you? A. Yes, sir, that is the one.

Mr. Murphy: I ask that this letter from Colonel Plant to the Superintendent, Army Transport Service, Base Section 3, Q P O 923 dated July 27, 1942 be marked for identification.

1157 It is marked Libellant's Exhibit 39 for identification.

Mr. Collins: Where was that given, at Melbourne?

The Witness: Yes, sir, at Melbourne before I left for Brisbane.

Q. Captain, when you got to Brisbane did you go down to the vessel and ask permission to go on board? A. Yes, sir.

Q. Did you have that pass with you, Libellant's Exhibit 39? A. Yes, sir.

Q. At that time was that red pencil writing on the lower third on that pass? A. No.

1158 Q. What occurred when you presented this pass at the vessel? A. I was turned back by an American sentry.

Q. What day was that? A. I couldn't be certain.

Q. Was it on the evening of the 29th when you got to Brisbane? A. No, sir.

Q. Was it the next morning, July 30th? A. Perhaps it was, I am not quite certain. I had heard some rumors in Brisbane and spoken to my agent about it. He told me that he did not believe that I would be permitted to go aboard.

Mr. Collins: I move to strike that out.

Q. All right, Captain, we will just go along slowly here and answer the questions. When you were turned back by the American sentry what did you do? A. I turned back.

Q. Where did you go? A. I went uptown.

Q. Where did you go? A. I went up to my agents, Dalgety.

Q. And then where did you go? A. I went down to Colonel Grimm.

Q. Who was Colonel Grimm so far as you knew at that time? A. Oh, I knew him at the time, I have known him a good many years.

Q. What was he? A. He was in charge of the Army Transport Service in Brisbane this time.

Q. By the way, you said Army Transport Service—was that United States Army Transport Service? A. Yes, sir. 1160

Q. Now, look at that red pencil writing on the lower third, and the date. Does that refresh your recollection as to when you saw Colonel Grimm? A. It shows that it was on July 30th that I did so.

Q. And that was after you had been turned back by the sentry at the vessel? A. Yes, sir.

Q. Was this writing put on that pass in your presence, were you there? A. Yes, sir, I was right there when he did it.

Q. Who wrote it? A. Colonel Grimm.

Q. After that what did you do with this pass? A. I went back to Mr. Smailes of Dalgety & Company and 1161 showed him that it had been approved by Colonel Grimm. It was too late to do anything more about it that same day.

Q. It was too late to do anything further about it that same day? A. Yes, sir.

Q. What did you do the next day—that would be July 31st? A. I can't be too certain but I believe I went back to the ship with the same pass and was turned back again.

Q. Do you remember when you first got on board the vessel? A. No, sir, I don't. It wasn't before I——

Q. I show you a paper and ask you what that is? A. I received this letter from Captain Williams.

Q. Was Captain Williams the man whom you mentioned before as being on board the *Portmar* before you left

1162 *Deposition of Axel Michelson—Direct.*

Darwin in connection with the salvage of the cargo? A. The very same.

Q. Now, when you had this pass did you present it on the vessel and did you get on board the vessel with this pass? A. Yes, sir.

Mr. Murphy: I offer this pass dated August 13, 1942 signed by J. P. Williams, Chief Salvage Officer, for identification.

It is marked Libellant's Exhibit 40 for identification.

1163

Q. Does that pass from Captain Williams refresh your recollection as to the date you first got on board the *Portmar*? A. Yes, sir, it does.

Q. And what date was it? A. The 13th of August.

Q. When you went on board the *Portmar* where was she lying? A. She was lying first at Tinkenba. Later on she moved up to South Brisbane, I forget the name, it was a milling company's wharf.

Q. But when you first went on board was she at Tinkenba? A. Yes, sir.

Q. Was anyone with you when you went on board? A. Yes, sir.

1164

Q. Who was with you? A. Captain Taylor.

Q. Was anyone else? A. No, sir.

Q. From that day forward did Captain Taylor make an examination of the ship? A. From that day and for several days subsequent both Captain Taylor and Mr. Horn were along with me down to the ship every day.

Q. Were you with them when they made their examination of the ship? A. Yes, sir, I was.

Q. While you were in Brisbane at this period did you receive any demand for salvage reward for services rendered to the *Portmar* by anybody? I show you a paper and ask you if that refreshes your recollection on that subject? A. Yes, sir, I did.

Q. What did you receive? A. I received a demand for 100,000 Australian pounds for salvage services that was sent me by my solicitors down in Melbourne.

Q. Are we to understand that your solicitors sent you a copy of a letter they had received? A. Yes, sir, that is correct.

Mr. Murphy: I offer for identification copy of letter addressed to Messrs. Malleson Stewart & Company, Melbourne, by H. F. E. Whitlam, Crown Solicitor, on the letterhead of the Commonwealth of Australia dated August 19, 1942. 1166

It is marked Libellant's Exhibit 41 for identification.

Q. Did you write to your solicitors, Messrs. Malleson Stewart & Company, a report of what you did and the examination you made of the *Portmar* at Brisbane during the period you have just mentioned? A. Yes, sir.

Q. I show you copies of two letters which you wrote to Messrs. Malleson Stewart & Company, one dated August 14, 1942 and one dated August 15, 1942, and ask you to refresh your recollection from those and with your recollection so refreshed I will ask you to describe the condition 1167 of the vessel as you found her.

Mr. Mount: Perhaps if we read that we may stipulate.

(Mr. Mount and Mr. Collins examine the letters).

Mr. Collins: I am willing to stipulate that if the master were questioned about it he would testify as far as the facts are concerned to the statements contained in his letters of August 14 and 15, 1942 to Malleson Stewart & Company and also to the opinions expressed in those letters.

Mr. Mount: We make the same stipulation in order to save time.

1168 Mr. Murphy: I offer for identification the master's letters of August 14, 1942 to be marked as Libellant's Exhibit 42 for identification, and letter of August 15, 1942 to be marked Libellant's Exhibit 43 for identification, both addressed to Malleson Stewart & Company of Melbourne.

Letter of August 14, 1942 is marked Libellant's Exhibit 42 for identification and letter of August 15, 1942 with its postscripts of August 15th and August 17, 1942 is marked Libellant's Exhibit 43 for identification.

1169 Q. Captain, did you subsequently receive a survey report from Captain Douglas Taylor and Mr. Horn? A. Yes, sir, I did.

Q. Did you receive a preliminary report before you received the final report? I show you a paper that may refresh your recollection. A. Yes, sir, I have seen this paper before. That was handed to me by Mr. Horn. I was pressing them for this report and they were so busy, they were working for both the Australians and the Americans, that they hadn't had time to sleep. They couldn't get any help, so it took them a long time before they got
1170 my report made out.

Q. Who handed you that paper you have in your hand? A. Mr. Horn himself.

Q. In whose handwriting it it? A. In Mr. Horn's.

Q. This paper then is to be considered a preliminary report by Mr. Horn? A. Well, that was a sketch of what he had seen at that time.

Q. As a matter of fact it is headed "Preliminary by Lieutenant Commander A. G. Horn written by himself"? A. Right.

Mr. Murphy: I offer this paper for identification and ask leave to substitute a photostat of it so that the master may retain it in his file. He wishes to do so.

1171

Mr. Mount: We have no objection to the introduction of this exhibit for identification or in evidence when offered as the preliminary report of Lieutenant Commander A. G. Horn, one of the owner's surveyors.

Mr. Collins: I concur.

Photostat copy of the preliminary report is marked Libellant's Exhibit 44 for identification.

Q. Captain, I show you what purports to be the final report of Captain Douglas Taylor and Mr. A. G. Horn, 1172
dated finally at the foot September 19, 1942. Is that the original final report that you received from Captain Taylor and Mr. Horn? A. Yes, sir, that is the one.

Mr. Murphy: On the same footing as the preliminary report I offer for identification original final survey report of Captain R. Douglas Taylor and Mr. A. G. Horn, surveyors representing Calmar Steamship Corporation. The survey started August 14, 1942, the report being dated at the foot September 19, 1942. It being understood that Mr. Mount and Mr. Collins make the same statement with respect to this as they did with regard to the pre- 1173
liminary report of Mr. A. G. Horn.

Final survey report is marked Libellant's Exhibit 45 for identification.

Q. After you got that final survey report of Mr. Taylor and Mr. Horn, which is now Exhibit 45 for identification, did you remain in Brisbane or did you go somewhere else? A. No, sir, I went back to Melbourne.

Q. Did you stop in Sydney on the way to Melbourne? A. Yes, sir, my solicitors in Melbourne——

Mr. Mount: That is after September 19th?

Mr. Murphy: Yes.

1174 Q. You were saying, Captain? A. I was saying that Malleson Stewart in Melbourne sent me a telegram asking me to meet Mr. Trumble in Sydney because they were going to have a meeting in Sydney concerning the Crown solicitor's letter.

Q. Was Mr. Tom Compson Trumble a member of the firm of Malleson Stewart & Company? A. Yes, sir.

Q. Did you meet him in Sydney? A. I met him but I did not meet him on the certain date stipulated because I could not get accommodations on the train.

1175 Q. But you finally got to Sydney and met him there? A. The day after, yes.

Q. While you were in Sydney did you hear any statement made by any representative of the United States Government regarding the cost of towing the *Portmar* from Port Darwin to Brisbane? A. Yes, sir.

Mr. Collins: I object until the representative of the United States Government is identified.

Q. Who did you hear make the statement, if you did hear anyone make the statement? A. Mr. Trumble told me first.

1176 Q. Oh, then you did not hear anyone make the statement? A. No, sir.

Q. Well, just for memorandum purposes for the moment, what did Mr. Trumble tell you—and for memorandum purposes I mean I am aware that it would be hearsay—what did Mr. Trumble tell you?

Mr. Collins: I object.

Mr. Mount: I object.

A. Mr. Trumble told me that Captain Williams had stated at a meeting the previous night that the cost of towing the *Portmar* to Brisbane was 32,000 Australian pounds.

Q. Did you ever hear after that that Captain Williams later reduced that figure? A. Yes, sir, I did.

Mr. Collins: Same objection.
Mr. Mount: Same objection.

Q. What did you hear? A. I heard that he had said that the real cost of towage had amounted only to 17,000 Australian pounds, maybe 17,500—it was in the vicinity of 17,000 Australian pounds.

Q. You say maybe 17,500? A. Possibly.

Q. Did you meet a Mr. John C. McHose while you were in Sydney? A. Yes, sir, I did.

Q. Who was Mr. McHose? A. Mr. McHose was the 1178
legal representative of the War Shipping Administration sent out to Australia from Washington.

Q. Did Mr. McHose have anything to do with Captain Williams' towage figures which you have just said were reported to you? A. Mr. McHose was present at the meeting where Captain Williams made those statements.

Q. Were you actually present in the room when Captain Williams made those statements? A. No, sir, I was not.

Q. And who was it that told you that Captain Williams had made the statement?

Mr. Collins: Objected to on the same ground.
Mr. Murphy: Understood. 1179

A. Mr. Trumble.

Q. What did you do after that meeting occurred? A. I went back to Melbourne.

Q. What did you do there? A. I awaited developments. I went back to Melbourne so I could stay close to my solicitors.

Q. Did you receive any notification of the fact that the United States of America requisitioned title to and possession of the *Portmar*? I show you a paper and ask you if that refreshes your recollection? A. Yes, sir, I heard about that. I am not quite certain that I have seen that paper before.

1180 Mr. Murphy: For the record I offer for identification original Western Union telegram addressed to Calmar Steamship Corporation by W. C. Peet, Jr., Secretary United States Maritime Commission, dated Washington, November 12, 1942 as Libellant's Exhibit 46 for identification.

It is so marked.

Mr. Murphy: And with it a copy of a certificate issued at Brisbane, Queensland, November 17, 1942 by H. A. Rettig, Superintendent Engineer United States War Shipping Administration, as Libellant's
1181 Exhibit 46a for identification. I am informed that Messrs. Malleson Stewart have advised Calmar Steamship Corporation in writing that they hold the original of this certificate in their file.

The certificate is marked Libellant's Exhibit 46a for identification.

Subject to check it is stipulated that title to and possession of the vessel *Portmar* were requisitioned by the United States acting by and through the United States War Shipping Administrator, effective as of 12 noon November 17, 1942 Eastern Australian Time at Brisbane, Queensland, Australia.

1182

Q. Now, Captain, did you wait at Melbourne for news of the *Portmar's* arrival at Sydney? A. Yes, sir.

Q. Did you make any preparation for a survey of the vessel after she got to Sydney? A. Yes, sir.

Q. Did you go to Sydney to make those arrangements? A. Yes, sir, I went to Sydney and I took my lawyer along with me.

Q. What kind of a survey did you want to have performed when the vessel got to Sydney? A. I wanted to have a survey of those parts of the ship that could not be surveyed while at Brisbane.

Q. Were those the parts of the ship that could not be examined while she was afloat? A. Yes, sir.

Q. Was it planned to put the *Portmar* on drydock at Sydney? A. Yes, sir.

Q. Did you hire any surveyors at Sydney to represent the *Portmar* and her owners? A. Yes, sir.

Q. Whom did you employ? A. Captain Howell and Captain Gibson.

Q. When did the *Portmar* arrive at Sydney? A. Monday, November 23rd.

Q. Who was Captain Howell and who was Captain Gibson? A. They were well-known surveyors in Sydney, surveyors to the American Bureau of Shipping, surveyors to 1184
Lloyd's and Veritas, surveyors to the British Corporation.

Mr. Mount: Was that one for hull and one for machinery?

The Witness: No, sir, they were both deck men and I told them if it was necessary to take an engineer along with them.

Q. When did you arrive at Sydney with Mr. Trumble? A. November 18th.

Q. And the vessel arrived November 23rd? A. That is right.

Q. Did the *Portmar* go on drydock as soon as she got to 1185
Sydney? A. No, sir.

Q. Why not? A. No space available.

Q. On what date did the *Portmar* go on drydock? A. (Referring to notebook) She docked at Dalgety's dock December 18th. I don't know when she went on drydock, I have forgotten.

Q. Was a survey held thereafter on the *Portmar*, a joint survey, at which the owners and underwriters of the *Portmar* and War Shipping Administration were represented? A. Yes, sir.

Q. When was that survey held? A. I cannot recollect.

Q. Was it after the *Portmar* went on drydock? A. Part of it was while she was on dry dock.

1186 Q. Was part of it held before she got on drydock? A. I believe so.

Q. Were you present at that survey? A. Yes, sir, I was present when she was surveyed in drydock.

Q. Were you present all through the examination made by those representatives of the various parties? A. No, sir.

Q. Do you know when work on the vessel was finished? A. No, sir, I do not.

Q. When did you leave Sydney and go back to Melbourne? A. Monday, January 11th.

1187 Q. At that time had they finished work on the *Portmar*? A. Nearly so. I believe there was a few things still remaining, trifles, a few things they were waiting for that they couldn't get before.

Q. On January 27, 1943 did you send a message to your owners? I hand you a cable and ask you if that refreshes your recollection? A. Yes, sir, I sent them that message.

Mr. Murphy: I offer the cable for identification.

It is marked Libellant's Exhibit 47 for identification.

1188 Q. I would like to go back, Captain, to just before you left Sydney. Before you left Sydney did you go on board the *Portmar*? A. Yes, sir.

Q. Did you look over the work that had been done on her? A. Yes, sir.

Q. Where was the *Portmar* then? A. She was in drydock in Woolwich.

Q. Is that near Sydney? A. Yes, sir.

Q. Is that the drydock of the Cockatoo Shipbuilding Company? A. That is one of their drydocks.

Q. How long was that before you left Sydney that you went on board the vessel? A. Not very long before I left.

Q. While you were on board the vessel did you go over the vessel and examine the work that had been done? A. Yes, sir.

Q. Did the work that had been done on the *Portmar* restore the vessel to the same condition in which she was prior to the first bombing attack in the Timor Sea on February 15, 1942?

Mr. Collins: I object to that.

Mr. Mount: I object to that as leading.

A. No, sir, it did not resemble anything of what Lloyd's would have asked for to put her back in class at all.

Mr. Collins: I move to strike out the answer as 1190
not responsive.

Q. Let me put it this way: From your own observation did the work that had been done on the *Portmar* up to the date on which you looked at her shortly before January 11th restore her to the same condition she was in before the first bombing attack in the Timor Sea on February 15, 1942? A. No, sir, it did not.

Q. What was the character of the work that had been done on her, from your own observation? A. I would say that it was some of the cheapest patchwork repair I have ever seen anywhere in the world. 1191

Q. Do you know what was paid for the work that was done on the *Portmar*? A. No, sir, I don't.

Q. Do you know whether the *Portmar* ever received a certificate of classification of 100-A1 British Lloyd's after the completion of that work in Sydney? A. No, sir, I don't, but I am——

Q. That is all right, that answers the question. After that it was on January 27, 1943 that you sent this cable to your owners which is Libellant's Exhibit 47 for identification, isn't that correct? A. Yes, sir.

Q. Now I show you a paper which purports to be a survey report bearing a heading date Sydney, 15th February, 1943. Did you see that paper or the original of it

1192 or a copy of it before you left Australia? A. I have never seen it before this minute.

Q. Have you ever seen a copy of this joint survey report before today? A. No, sir.

Mr. Mount: Your testimony was that you left Sydney before the work was entirely completed?

The Witness: Yes, sir.

Q. Now I will ask you to assume that this is a duplicate original of the survey that was made on the *Portmar* at
1193 Sydney and I will ask you to assume that this report contains the following statement: "The cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000 Australian currency, which figure includes the amounts to cover outstanding items mentioned in Clause 3 D below". Now, assuming that, do you agree with that conclusion? A. No, sir.

Mr. Murphy: I submit this document to counsel for the United States and counsel for the underwriters for their inspection.

1194 Q. When you left Sydney on January 11, 1943, was the *Portmar* still there—did you leave her behind you? A. I believe she was lying ready to go out. She was out in the stream and inaccessible.

Q. After you got back to Melbourne did you give testimony in a suit instituted by people who claimed salvage reward for services rendered to the *Portmar*? A. Yes, sir.

Q. Do you know when that suit was instituted? A. No, sir, I don't. I was told by my attorneys that I had to deposit 500 Australian pounds in Court before anything could be done. I went and drew a check for £500 and went with Mr. Trumble to deposit the check and I was told that there would be a hearing and I would have to be a witness shortly afterwards, which I was.

Q. Did you testify in those salvage suits? A. Yes, sir.

Q. Do you know the names of the parties who brought the suits? A. Yes, sir, it was the Salvage Corporation and I believe Captain Williams was named separately.

Q. Did the Commonwealth Salvage Board also bring a suit? A. Yes, sir.

Q. Did you testify with respect to both actions? A. Yes, sir.

Q. Did anyone else from your officers or crew testify as a witness while you were there? A. No, sir, there was nobody else there but myself. 1196

Q. On what date did you give your testimony in those suits? A. It seems to me it was in the first of March, I am fairly certain but I wouldn't swear to it.

Q. All right, the record will show. After your testimony was taken, did you cable your owners? A. Yes, sir.

Q. I show you a cable sent by you to Mr. Warley, President of Calmar Steamship Corporation, on March 3, 1943 and ask you if you sent that cable? A. Yes, sir.

Mr. Murphy: I offer the cable for identification.

It is marked Libellant's Exhibit 48 for identification.

The Witness: May I say one more word, outside of the record probably—it says in that telegram that all survey reports have been turned in to the solicitors. As far as I know this here last joint survey had not been turned in. In fact, I am almost certain it had not because I have never seen or heard anything about it. 1197

Q. Are we to understand that the statement in here "All survey reports now turned in to solicitors" did not include this so-called joint survey? A. No, it did not.

Q. Did you receive a reply to that cable, Libellant's Exhibit 48? A. I believe I did.

Q. I refresh your recollection by that paper (handing witness paper)? A. Yes, sir, I received that.

1198 *Deposition of Axel Michelson—Direct.*

Mr. Murphy: I offer the cable of Mr. H. W. Warley, President, Calmar Steamship Corporation, to Captain Michelson, dated March 3, 1943 for identification.

It is marked Libelant's Exhibit 49 for identification.

Q. When did you leave Australia for the United States? A. That was shortly after I received that telegram.

Q. Was it on the 6th of March, 1943? A. I believe so.

1199 Q. When did you arrive in New York, about? A. I arrived in San Francisco on the 22nd and I believe in New York the 1st of April.

Q. You arrived in San Francisco when? A. The 22nd of March and I believe in New York the 1st of April.

Q. Have you any notes that will show you? A. (Referring to notes.) I had them, but I cannot find them. I haven't got them with me.

Q. Captain, while you were in Australia, from the date of the bombing attack of February 19, 1942, until the day you left Australia and until you got back to New York, did Calmar Steamship Corporation pay your salary? A. Yes, sir.

1200 Q. Have you received your salary in full for that period? A. Yes, sir.

Q. While you were in Australia did you expend certain money for your personal expenses, traveling expenses and hotel bills, meals, railroad fares, while you were there? A. Yes, sir.

Q. Did you expend certain money for legal fees to Messrs. Malleson, Stewart & Company? A. Yes, sir.

Q. Did you expend money for consular expenses and for kindred matters? A. Yes, sir.

Q. Were all those moneys expended in the interests of the SS. *Portmar?* A. Yes, sir.

Q. Is this your expense account which you submitted to the Calmar Steamship Corporation after you got back to New York? A. That is my expense account, yes, sir.

Q. There appears herein a sheet of long, blue lined paper, a list of items. Is that in your own handwriting? A. Yes, sir.

Mr. Murphy: I offer the expense account for identification.

It is marked Libellant's Exhibit 50 for identification.

Mr. Mount: In not objecting to Libellant's Exhibit 50 for identification, we, of course, do not commit ourselves in any way as to the amounts or the propriety of the items. 1202

Mr. Collins: We take the same position.

Mr. Murphy: So understood. In response to notice to produce served by counsel for the underwriters, Messrs. Duncan & Mount, on July 23, 1945, we have assembled many documents from the files of Calmar Steamship Corporation and from the files of Captain Michelson. Many of these documents have been offered here for identification. The balance of them we have collected in an envelope and now submit them to Mr. Mount for his examination.

Q. Captain, a notice to produce served by counsel for the 1203 underwriters calls for production of all logs of the *Portmar* subsequent to December 10, 1941. We have already marked the smooth log and a photostat of the official log from February 15th on. The question has been asked whether there was any rough log of the *Portmar*. Was any rough log kept? A. No, sir.

Q. How were the concurrent entries made? A. From a log slate.

Mr. Mount: You are not offering as an exhibit for identification the master's testimony in the Melbourne suit?

Mr. Murphy: That is correct, I am not offering it. It has been submitted to you for examination and

you may offer it if you wish to do so. I do not regard it as applying to the matters in issue in this case.

Mr. Collins: We understand however that counsel for the respondents in both suits may refer to the master's testimony in connection with cross-examination.

Mr. Murphy: That is always open to counsel in cross-examining the witness. It is a statement made under oath on another occasion and obviously he may be cross-examined on it.

1205 Mr. Collins: I mean there is no question that that was his testimony?

Mr. Murphy: No question at all except the Captain may say that the stenographic report is not correct.

Mr. Mount: Yes, but it is true, isn't it, that the copy of the master's testimony and the other testimony in proceedings in the salvage suit at Melbourne were sent on to Calmar Steamship Corporation by their own attorneys in Melbourne?

Mr. Murphy: That is right.

1206 Mr. Collins: Does that conclude the master's direct?

Mr. Murphy: Your witness.

Adjourned to 10:30 A. M., August 2, 1945.

Met pursuant to adjournment, 10.30 A. M., August 2, 1945.

Present as before.

AXEL MICHELSON resumes the stand.

Cross examination by Mr. Mount:

Q. Captain Michelson, there are a few details that I would like to clear up as to the facts. In San Francisco

when the ship was chartered to the Maritime Commission who were your agents in San Francisco? A. We had our own office in San Francisco.

Q. Who were the agents for the Maritime Commission, if you remember? A. That I couldn't tell you, I don't know, sir.

Q. Now, in San Francisco you testified that you received secret orders and some other confidential documents from the Naval Control officer, was it? A. Yes, sir.

Q. Did you get those yourself from the Naval Control officer? A. Yes, sir. 1208

Q. And who told you to go there? That is was it your own office or was it the Maritime Commission's agents, if you remember? A. I believe I got the order direct from the Naval Control officer to come up there at a certain time. I am not absolutely certain but I believe it is so.

Q. You testified as to writing two letters to Calmar Steamship Corporation from Port Darwin which you said did not get through, and a third letter to your wife. Did the letter to your wife get through? A. No, sir, I testified that I wrote three letters from Suva in the Fiji Islands. Neither the letter to the wife nor the others got through—that is, I know the wife's did not, I am not quite certain about those, they tell me they never received them which I believe is so. 1209

Q. Yes—that was Suva? A. Yes, sir, that was Suva.

Q. And at Sydney you testified that you tried to send a message from Sydney by your agents and also by the American Consul? A. Yes, sir.

Q. And you said the American Consul said it was impossible to get any cable through? A. Yes, sir. When I say the American Consul I mean one of the Consuls or Vice Consuls because I merely saw the Consul General but I did not speak to him on any business.

Q. It was one of the American consular staff? A. Yes, sir.

Q. Did you try to send any letters from Sydney, if you remember? A. I sent a letter to the wife. I don't believe

1210 I sent any to the Company because they told me that the mail would not go through and they would never get it. As a matter of fact the wife never got hers either.

Q. Was I correct in understanding your statement yesterday to be that as to the routes you were to take beginning with Suva, they were directed by the Australian Naval Control officers but that as to disposition of the cargo, that was ordered by the American authorities, is that correct? A. That's right, that is the way it turned out.

Q. That is the way it was all the way through? A. Yes, sir.

1211 Q. And that was true with respect to the orders you got to sail from Port Darwin for Wyndham with the 2,000 drums of gasoline? A. Yes, sir.

Q. What kind of a port was Wyndham, if any? A. Not much of a port, it is in Western Australia. Western Australia is very much socialist and the Government owned a slaughter house and a meat-packing plant in Wyndham. It was also a little pearl fishing port, that was just about all.

Q. Was there any pier or dock there? A. Yes, sir.

Q. That you went alongside? A. Yes, sir.

Q. Does your logbook show the distance from Port Darwin to Wyndham? A. I am not quite certain.

1212 Q. Will you look and see, Captain? A. (Referring to logbook) It shows the distance from Darwin entrance to Wyndham entrance. There was a long river up, from the entrance and up to Wyndham, and that distance is not shown in the logbook when it comes to the inland navigation of that river.

Q. Well, does it show from the entrance to Port Darwin Harbor to the entrance to Wyndham Harbor? A. Yes, sir.

Q. And how much was that? A. 286 by the logbook.

Q. And who was it who gave the order to return from Wyndham? Was that Australian authorities or American authorities? A. That was understood and included in the orders I got before I left Darwin.

Q. Yes, I understand you got the orders before you left Darwin to come back? A. Yes, sir.

Q. And who was it gave you those orders? A. The British Naval Control, Australian.

Q. Now, when you were on the United States Cruiser *Houston* on the evening of February 14th you testified that Captain Rooks of the *Houston* explained the orders? A. Yes, sir.

Q. Did he tell you anything about the condition at Koepang? A. Yes, sir.

Q. Are you at liberty to state what that was? A. May I 1214
ask Mr. Murphy for permission to do so?

Q. Yes,

The Witness: Will it be all right if I do so (addressing Mr. Murphy)?

Mr. Murphy: I think that is all right as this is an impounded action. It may not be relevant or material but if Mr. Mount wants to know what Captain Rooks said to you I see no objection to your saying so.

Mr. Mount: I think the event is far enough back to be of no military danger to the Government at this time. 1215

The Witness: Gentlemen, I would not like to get in trouble for saying things I am not supposed to say but I do believe I am safe here to say so.

Q. We will not repeat it, Captain. A. All right. Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said "Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor, I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can".

Q. Was it a matter of common knowledge in Darwin that an Empire Airways flying boat had been destroyed by

enemy action en route from Darwin to Koepang on January 29, 1942—was that generally talked about? A. I heard it spoken of. The details I never found out about.

Q. But it was talked about? A. It was spoken of, yes, sir.

Q. Was it also a matter of common knowledge that the port of Koepang had already been bombed by Japanese war planes? A. Yes, sir, that was known in Darwin. There were Dutch pilots that came up from Koepang and went up and told the military authorities in Darwin the
1217 exact conditions.

Q. Were those Dutch vessels which had fled from Koepang? A. No, they were planes.

Q. Following the air raid in Port Darwin Harbor on February 19th you testified that the chief officer reported a fire in No. 4 hold? A. Yes, sir.

Q. Was there also some fire in No. 5 reported to you or was it only in No. 4? A. I cannot be quite certain. There may have been a fire in No. 5 also but it seems to me that there was fire in No. 4 twice.

Q. Yes, that was your testimony. But that was gotten under control and put out, wasn't it? A. Yes, sir.

1218 Q. Now, will you look at the chart of Port Darwin Harbor, Libellant's Exhibit 4 for identification, and figure out how far it was from your anchorage of February 18th and 19th before the raid to the place of your anchorage off Channel Island?

Mr. Collins: May I suggest that the question is not quite clear. You mean the first anchorage off the Leper Colony or the point where he afterwards beached the vessel?

Mr. Mount: I said the anchorage off Channel Island. Then I am going to ask him from there on to the beach.

Mr. Collins: All right.

A. (Using dividers) About 4.4 miles.

Q. And then from that anchorage off Channel Island to the point where the *Portmar* stranded how much further would that be, considering the course you had to take, I mean how far did she travel? A. (Using dividers) About 1.2 or 1.3, I cannot be certain because it was kind of a round-about course—rather more than less.

Q. That is close enough. Now, the holes in the side of the *Portmar* following the Japanese attack on February 19th were so far as you know made by the exploding bombs? A. Yes, sir, and machine gun fire.

Q. And the damage to the bridge, was that done by the 1220
force of bomb explosion? A. Yes, sir, concussion. There was also there damage by machine gun fire.

Q. Without minimizing what you all went through, I understood your testimony to be that the damage which was done to the *Portmar* was done by gun fire and cannon fire and near misses of the bombs? A. That's right.

Q. That is, there was no actual direct hit on the ship of a bomb? A. No, sir.

Q. Before you and the crew left the *Portmar* following the stranding on February 19th did you order the fires in the engineroom put out? A. Yes, sir.

Q. That was to stop any danger of explosion of the 1221
boilers? A. Yes, sir.

Q. And my notes of your testimony are that you stated that before you left the vessel on the 19th of February you dropped the starboard anchor so that she had both the port and the starboard anchors out? A. I dropped the port anchor before the crew was taken off and I dropped the starboard anchor later on before I went to Darwin.

Q. Did you have any agents at Port Darwin? A. When I arrived at Port Darwin I was told by the Australian Naval Control that I better get an agent so I told them I did not know anything about Darwin at all, if they thought it was necessary that I get an agent I would get one, and they said I better go down to Captain Gregory. I did so, I went down to Captain Gregory and asked him if he would be my agent. He said he would. Later on when I got more acquainted

1222 *Deposition of Axel Michelson—Cross.*

with the officers of the American Army, especially Colonel Jones, also Colonel Robinson who was commanding officer at the time, they told me "Captain, you made a bad move when you went up and had Captain Gregory for an agent". I was a complete stranger, I did not know anything about the town, so I said "Colonel, how so?" he says "I don't like Captain Gregory and I am afraid that if he is going to stay your agent it won't be long before you won't like him either".

1223 Q. Now, Captain, you don't need to go any further on that. All I wanted was who was the agent. I understand that he turned out unsatisfactory. A. And may I say a little more? I went down to Captain Gregory then and told him that his agency of the ship was cancelled, I did not want him because I could not afford to have an agent that the American Army did not approve of.

Mr. Murphy: Will you ask him who was his agent after that?

Q. Did you have another agent after that? A. No, sir.

Mr. Murphy: You acted as your own agent?

The Witness: I did my own work.

1224

Q. And of course when you left San Francisco you did not have any agents appointed in Australian ports? A. No, sir.

Q. The same is true of Sydney—when you first arrived at Sydney did you need an agent there? A. Yes, sir.

Q. Did you pick one yourself? A. Yes, sir, I did after consulting men that knew a little bit about the town, such as pilots and the doctor that came aboard ship.

Q. And you chose Dalgety? A. I chose Dalgety.

Q. When you got to Brisbane you were there longer because you discharged some of your cargo? A. Yes, sir.

Q. And you had to make up your own mind there about choosing an agent, didn't you? A. Yes, sir.

Q. And you again chose Dalgety & Company? A. Yes, sir.

Q. And you did not need any lawyers until you got to Melbourne in March 1942? A. No, sir.

Q. Do you remember when the salvage of the cargo started? As I recall your testimony you said that on the evening of February 21st you were on Channel Island and you saw a launch coming down and it had Captain Williams and your own chief officer and Colonel Petterson? A. Yes, sir.

Q. That was February 21st. Do you know when the actual work of salvaging the cargo started? I suppose it was a day or so later? A. It took about two or maybe three days to get the gear together before they started. 1226

Q. Who was assisting Captain Williams and Captain Low—was it Mr. Low or Captain Low? A. I believe he was a captain also. He was a seafaring man.

Q. Who helped them? A. The American Army and the Australian Navy.

Q. Do you know how much of the cargo was out the last time you saw the *Portmar*? A. Very little.

Mr. Collins: The last time he saw the *Portmar*? 1227

Q. At Darwin, I should say. A. Yes, sir.

Q. In the camp of the United States Army where you testified you and the crew were confined, were there crews of any other vessels there under guard like your crew? A. Yes, sir, a good many.

Q. And when you took the train to Melbourne on March 10th were there other crews or members of other crews on the train with you? A. Yes, sir, not all of them but a few of them at least.

Q. Will you tell us in a little more detail about your attempts to get back to Darwin from Melbourne? Whom did you see about that? A. First of all my lawyers. Most of the attempts that I made to get back to Darwin were

1228 made through Malleson Stewart & Company because I realized that I had no chance at all. Malleson Stewart & Company, they knew everybody in town, they knew how to go about it. I was with Mr. Trumble of Malleson Stewart up to Colonel Plant's office once. That is the only time I believe that I was asking for transportation to Darwin myself. Colonel Plant let it be understood that there was no chance at all.

Mr. Collins: This may or may not be important. I move to strike out as a conclusion the statement
1229 that Colonel Plant led him to believe that there was no chance at all and suggest that he testify as to what Colonel Plant said.

Mr. Murphy: I wish to point out the witness did not say he was led to believe, that he testified directly to what Colonel Plant said.

(The answer of the witness is read by the stenographer.)

Mr. Murphy: I withdraw my comment. I misunderstood the witness' statement.

1230 Q. You worked through your lawyers on that point because you realized that you were a stranger in Australia? A. I knew that everybody that had anything to do with the case was trying to prevent me from getting back to Darwin and therefore I did not do too much about it direct because I knew that I would have no chance whatsoever.

Q. Were you in Melbourne from March 22nd until you left for Brisbane about July 29th or a day or so before? A. Yes, sir.

Q. During that time did you get any reports at all about the *Portmar* other than the news that you testified to yesterday that you heard she had been raised? A. Yes, sir, I did, I got news from her right along.

Q. Through what channels did that news come? A. Different channels, a good many different. All the Ameri-

can soldiers that came down from Darwin, American officers that came down from Darwin, stayed in the same hotel I did. They knew me by sight and they would talk to me if they met me on the street. Sailors that had their ships wrecked in Darwin at the same time and were held there a good deal longer than we were, they came down, they knew me by sight. Some of them came and saw me personally because they wanted my advice on different matters, how to get back to the States. It seems that I was the only captain that stayed in Darwin with his crew. All the others, they managed to get out somehow the same 1232
evening by plane to South Australia. I am not very friendly with any of the unions here in Australia and America but for some reason they thought it was all right that I stuck to my crew until I got them out of there and they knew me and they came and spoke to me. When I asked them questions about the thing that I was most concerned about they told me what they knew about it and I believe they told me the truth, in fact I know they did.

Q. Well, now, Captain Williams——

Mr. Murphy: Mr. Mount, will you allow me to suggest perhaps he has not quite finished as to his sources of information. Will you ask him if there 1233
was anyone else?

Q. I did not mean to interrupt you, Captain. Had you finished? A. Well, I can possibly think of more. There was a couple of missionaries and Roman Catholic chaplains that I had seen in the camp out there, they came to town also. Asking them about what they had seen they told me what they knew about it.

Q. Anybody else? A. That is all, I guess.

Q. What about seeing Captain Williams in March at Melbourne when he came down to Melbourne? A. Of course I always made the rounds of all the offices in Melbourne, such as Lloyd's. They were willing to tell me openly what they knew. It took a little time before they found out.

1234 There were Lloyd's surveyors in Melbourne also. There was Dalgety, my agents, they were known all over Australia and had sources of information that they could find out practically anything they wanted to know and get good information. They were willing to tell me what they knew concerning this case of mine.

Q. So you did keep in more or less touch with the situation? A. Yes, sir, I was in touch with the situation right along.

Q. Now, it was from Captain Williams, wasn't it, that
1235 you learned first that the vessel had been raised, when he was down in Melbourne? A. No, I had heard it from someone else before I heard it direct from Captain Williams. I believe I heard it the day before I met Captain Williams at the office of Owen Dixon.

Q. And then Captain Williams went back to Port Darwin, didn't he, after he told you about the raising of the boat? A. Yes, sir, I think he did.

Q. Do you happen to know whether he came down to Melbourne for some pumps? A. I found out later on that they had gotten two 14-inch pumps—I am not quite certain about this 14-inch—that they had gotten two 14-inch pumps
1236 and a donkey boiler and the Australian Government had helped them get them the 2500 miles more or less through the desert through Central Australia to Darwin.

Q. And along with the pumps didn't Captain Williams also get a diver at Melbourne? A. Captain Williams, he had before this time been engaged in salvage work, he had been very successful in getting five million pounds of gold out of a steamer, the *Niagara*, that had been torpedoed off the Coast of New Zealand. He had a little organization of his own or belonging to his company that had been held together since he had salved the gold for the British Government and it was one of those divers—there were two brothers Johnson that he had in his outfit—either one or both went with him to Darwin.

Q. They were his own organization? A. As near as I understood, yes, sir.

Mr. Collins: They went with him from Melbourne, do I understand? You said they went with him to Darwin—you mean they went with him from Melbourne to Darwin?

The Witness: I don't know where they had their headquarters. That may have been Adelaide for all I know. That would be a little more direct.

Q. Captain, when you speak of Lloyd's agent in various ports, that is the man who appoints surveyors and has surveys made in connection with damages to cargo and also 1238
takes care of classification requirements when repairs are made—that is what you mean by Lloyd's agent, isn't it? A. Yes, sir.

Q. You don't understand that that Lloyd's agent was an agent of the underwriters of Lloyd's? A. No, sir, I mean strictly the classification part of Lloyd's.

Q. The business part? A. Yes, sir.

Q. You testified yesterday that for the joint survey of the *Portmar* at Sydney you appointed Captain Howell and Captain Gibson who were surveyors for the American Bureau? A. Yes, sir, with the consent of my lawyers.

Q. Yes. Now, do you know how long they spent at Sydney in making that survey? Were you there during 1239
all the survey? A. Yes, sir, I believe I was.

Q. I wonder if you can help me with these signatures, Captain. On this document which Mr. Murphy has handed me, which is under the heading of Lloyd's Register of Shipping, Port of Sydney, dated February 15, 1943—these are just initials on the first page but coming over to the signatures, that is Captain Howell's signature (indicating)? A. Yes, sir.

Q. Now, what is this (indicating)? A. D. S. Carment.

Q. And he is described as Associate Naval Architect Cockatoo Docks & Engineering Company Pty., Limited? A. Yes, sir.

Q. Is that the ship repair concern that made the repairs? A. Yes, sir.

Q. And the *Portmar* was at their dock? A. Yes, sir.

Q. And in their drydock? A. Yes, sir.

Q. Now the signature James C. E. Erskine—he was surveyor to Lloyd's Register? A. Yes, sir.

Q. Can you make out that top signature? A. Yes, sir, that is McCowan, he was the principal surveyor to Lloyd's in all of Australasia. Those two men were Lloyd's men.

Q. Represented Lloyd's agent? A. Yes, sir.

Q. And Howell and Gibson represented you, your owners? A. Yes, sir.

1241 Mr. Mount: I offer for identification this signed copy of survey made at Sydney and dated the 15th of February 1943.

Mr. Murphy: No objection but I reserve the right to dispute the conclusions stated in this document.

Copy of survey is marked Underwriters Exhibit A for identification.

Q. You said you were present during this survey, Captain. Your testimony was that you arrived at Sydney November 18, 1942? A. Yes, sir.

Q. And that the *Portmar* was then docked at Dalgety's dock? A. Yes, sir.

1242 Q. And I was not quite sure when she went on drydock? A. No, sir.

Q. You don't remember that? A. No.

Q. Was it in November or December? A. December, the last part of it may have been finished in the month of January.

Q. And they were working on her through January, is that right? A. As far as my own surveyors are concerned, they were very, very busy. I was down in their offices every day and the Australian Navy would take them up—they were compass adjusters also. They were building a bunch of small craft. They had to take them up on trial trips and the survey had to be done piecemeal because they had so much other things to attend to that it could not be done

at once. About Lloyd's surveyors I don't know. I was down there but once. I saw Erskine down there and Carment, I saw him too down there, but I don't know what he had to do with the survey unless he was hired by someone else as a surveyor, probably the War Shipping Administration.

Q. To whom was the official logbook sent—and by official log I mean the log that had the matters dealing with the crew, a photostat copy of part of which is Libellant's Exhibit 34 for identification? A. The official log was in my keeping until I sent the crew home from Melbourne. I put 1244
the chief mate in charge of the crew going home. He was to pay the crew off when he arrived in the States. The official log contained all the accounts of the crew. I gave him the log along when he went back to the States on the *West Point*.

Q. The three hundred or so soldiers of the 148th Field Artillery Regiment were fully equipped for war, weren't they, so far as you could tell? A. I am not a soldier, sir, but I believe they were. I would not be a good judge of that.

Q. Can you express an estimate of how near Koepang you got on the trip from Port Darwin to Koepang when you turned back on February 16th? A. A little better than half 1245
—say three-fifths of the distance.

Q. Now, Captain, I am going to ask you one of those questions again about orders. Did any official tell you why the convoy was turned back? A. No, sir. I have no official information why we did turn back. I heard rumors but that's all.

Q. Have you any photograph of the vessel as she lay in Darwin on the beach? A. No, sir.

Q. Have you seen any photographs of her in that position? A. No, sir.

Q. Have you any photographs of the vessel in Sydney or in Brisbane? A. No, sir, we were not allowed to have any cameras aboard the ship. That was by the Navy and the Army. I was responsible for it that there was none aboard

1246 the ship. We had several aboard the ship, but they were always under seal.

Q. The thirty-ton derrick which was on your forward deck, was that injured in the bombing? A. I don't believe so.

Q. I understood you yesterday to say, Captain, that some officer of the United States Army had told you that the troops were all packed up and ready to go if there was an invasion, or was that something that you concluded yourself? A. No, sir, there was an officer told me that.

1247 Q. And I am going to ask you what rank he was? A. Colonel.

Q. Do you remember his name? A. Yes, sir. I don't like to identify him though unless you make me.

Q. I won't make you, Captain. Now, I want to ask you one or two things, Captain, about some testimony you gave down in the suit. Where did you give your testimony, in Melbourne? A. Yes, sir.

Q. Do you happen to know whether the suit was pending in Melbourne?

Mr. Murphy: I understand it was in Melbourne. The captain may not know what you mean by pending.

1248 A. It was pending in the High Court and the way I understand it the High Court was held alternately in Sydney and Melbourne.

Q. But you gave your testimony in Melbourne? A. I gave my testimony in Melbourne, yes, sir.

Q. You gave your testimony before a Notary—you were not actually in the courtroom, were you? A. Yes, sir.

Q. Oh, you were? A. It was not before the Court. There was a Commissioner appointed to take my deposition, but it was held in the courtroom.

Q. I see. And then shortly after you gave your testimony you came on home? A. Yes, sir.

Q. Now, in the copy of this testimony which I have been handed by Mr. Murphy in response to our notice to produce

I ask you to look on page 25, question and answer: "Now, as a sailor, tell me this: Unless somebody did something to that ship after you had left her would you expect the ship ultimately to become a total loss or not? A. She could have laid there for a year or even longer and it would not have made any difference one way or the other". Was that question asked you and was that your answer, Captain? A. Yes, I believe it was.

Q. Now on the next page, page 26, the question was asked you: "You say there was no risk of that ship breaking its back; that is your story, is it? A. There was no more 1250 chance of breaking her back, as you call it, as there was the first or second day she came in if she had laid there for a year". Was that the question asked you and was that your answer? A. Yes, I believe it was and I believe that was my answer.

Q. Now on the next page, 27, "Q. Did you understand that Captain Williams was a man who was an expert at salvage? A. I knew that he was somebody who had something to do with salvage. I did not know Captain Williams. Q. But you knew that he, this man, who was present, had something to do with salvage? A. Yes". That is correct, is it, Captain? A. I believe so.

Q. And on page 32 the question was asked you: "Would 1251 you have started with the aft batch? A. No; I would have raised the ship first. You said 'if you had the necessary crew and equipment'. Q. You would have raised the ship first? A. Yes." Were those questions asked and were those your answers? A. Yes, sir, I believe so.

Q. And then continuing on page 32 the question was asked you "How long would that have taken you? A. With the necessary equipment it would not have taken very long. Q. I am talking about doing it at Channel Island, not at Cockatoo Dock. First of all, what equipment would you have required? A. I would require pumps and steam; that would be the only thing required". Was that question asked and was that your answer? A. Yes, sir, I believe so.

Q. And then on page 33 the question was asked "But assuming you had been able to get the necessary pumps and steam in Darwin, how long would you have expected to take? A. You were the one who was supposing, I had all the necessary gear and equipment; I was not. Q. I am still supposing it. Supposing all those things, how long would it have taken to raise the ship? A. I would have to figure that out. I am not a professional salvager, but I knew it could be done". Were those questions asked and were those your answers? A. Yes, sir, I believe it was. It seems
1253 that this is shortened for both the questions and the answers but this is a long time ago and I can only say that——

Q. Well, you may remember yesterday, Captain, that Mr. Murphy agreed that this was the copy received from your attorneys in Melbourne? A. That's right. I have never seen this copy before.

Q. I never saw it either until a couple of days ago. A. It was not ready when I left Australia.

Q. Now, on pages 37 and 38, the bottom of page 37 the question there was asked you: "Did you find yourself able to make any examination of the state of the sea floor where the heel of the ship rested; was it silt or what was it? A. We sounded there a couple of times"—and then on page
1254 38 continuing: "Seemed to me to be stiff clay". Is that correct or is that the fact? A. Yes, sir, to the best of my knowledge.

Q. And on page 38 the question was asked you: "Let me put it this way: No one ever came back to the ship again except for the purpose of getting provisions out of the ship? A. That is right". That is correct, isn't it? A. No, it doesn't sound correct and I don't believe it is. That is what the record says.

Mr. Murphy: I suggest that the preceding question and answer should be read so that the meaning of that question and answer will be clear.

Q. What I mean is that after the crew left none of the crew came back except for provisions? A. No, sir, that's right. The only ones that came there for any other purpose was the chief mate and myself.

Q. The launch *Nevbet* that was on the *Portmar* was put over the side after the bombing on February 19th by your thirty-ton derrick? A. Yes, sir.

Q. And you said in this Melbourne testimony that that thirty-ton derrick could have handled any cargo forward, is that corerct? A. Yes, sir.

Q. You also testified, as you did here, that you had no 1256
conversations with Captain Williams about raising the ship. That is correct, is it? A. Yes, sir, the thing was never even hinted at.

Q. And nothing was said between you and Captain Low about raising the ship? A. No, sir, I believe not. I was not on such very good terms with any of those gentlemen. They tried to keep away from me.

Q. In your testimony in Melbourne on page 13 referring to the holes in the side of the ship the question was asked you: "Whereabouts were the greater number of these holes? A. In Nos. 4 and 5 holds and in the engineroom.

Q. About how many of them were plugged? A. I do not 1257
know for certain but about fifty of them". That is correct, isn't it? A. No, sir.

Q. How would you vary that testimony? A. I had then been at the survey of the ship up in Brisbane. I had counted every one of those holes and had to go and get a piece of chalk so I could mark them so I wouldn't count them twice. It was very difficult to get the chalk but I got it and I marked the holes and counted them and there was 91 holes and I did not tell the High Court in Melbourne anything different than that.

Q. No, this was how many had been plugged before you left Darwin (pointing out to the witness the question in the record)? A. Oh, I missed the word "plugged" there.

1258 Q. You can read before this if you want to pick up the story. A. Yes, sir.

Q. That is correct, as it is stated in the testimony? A. I believe it to be correct, yes, sir.

Cross examination by Mr. Collins:

Q. Captain, when you moved from your second anchored position, which was opposite the Leper Colony on Channel Island as I understand it from your testimony on direct, you tried to make some point picked out by you and the
1259 mate, is that correct? A. Yes, sir.

Q. And were you familiar with those waters there? A. No, sir, never been there before.

Q. And about all you could do was to watch the water over the side to get some idea of the depth, is that correct? A. Yes, sir.

Q. And you did bring up pretty close to the point at which you were aiming, is that right? A. Yes, sir.

Q. Your official log, Exhibit 34 for identification, for February 19th states the following: "With both compasses destroyed by machine gun fire we did not succeed in putting the ship in the exact spot we had picked for her and
1260 she grounded a little to one side of it at 2.12 P. M.". That is correct, isn't it? A. Yes, sir.

Q. In other words, what you did was to beach the vessel but not at the precise spot that you picked but one very close to it, is that about it? A. Yes, sir.

Q. Now, after the attacks by bombers to which you were subjected on the voyage to Koepang you immediately concluded that the ship had been damaged from stem to stern, did you not? A. I concluded that she had been weakened in her structure.

Q. And you made the entry in the deck log for February 16th: "Vessel weakened in her entire structure from fore to aft"? A. Yes.

Q. That was your understanding at the time? A. Yes, sir.

Q. That was based on rather a superficial examination, was it not? A. Well, we did not have time for no exhaustive survey.

Q. You could not really tell whether the vessel had been weakened in her entire structure without a survey of possible damage, is that correct? A. Yes, you could.

Q. Your conclusion that she had been weakened in her entire structure at that time was based on what? A. The entire absence of vibrations in the ship when she was run full speed. It was based also on what the chief engineer and the chief mate told me, paint and scale and rust had 1262
dropped out of all the joints between the frames and the plate.

Q. After the return of the vessel to Port Darwin did you attempt to have any survey then made of the damage? A. No, when you are watching for the Japanese to come in you don't have time for no surveys to be made.

Q. The first thing you did, I understand, was to go to Port Darwin and endeavor to note a protest, is that correct? A. The first thing I did was to go to Port Darwin and attempt to note a protest but I was told by very good authority, the British authorities of the town, that there was no official left in Darwin to note such a protest. They 1263
even told me that the administrator of the town had left in such a hurry that he had forgotten to take his wife along with him.

Q. At any rate, did you make any attempt to find anybody qualified to examine the ship at that time? A. No, sir, I did not.

Q. Your conclusion after you had arrived at Port Darwin was that the condition of the vessel was then hopeless, is that correct? A. I don't know exactly what you mean by hopeless. If you mean that salvage was in my opinion next to impossible you are right.

Q. Did you tell Captain Williams on February 24th that you were going to give the underwriters notice of abandonment? A. No, sir, I did not. Captain Williams was after

me several times and wanted to know if I was going to abandon the vessel. I found out afterwards that Captain Williams did not even know the difference between leaving the ship and abandoning it to the underwriters.

Q. Well, will you just listen to this testimony which according to this copy of the transcript you gave in the salvage suit at Melbourne, beginning at the bottom of page 18: "During that day, the 24th—24th of February—did Captain Williams come aboard? A. Yes. Q. Was anybody with him? A. Colonel Petterson of the U. S. A.
1265 Army. Q. Did you have any conversation with Captain Williams during the day? A. Yes, once. Q. What did you say to him and what did he say to you? A. I told him that I was anxious to get in touch with a public official so that I could note a protest and I was anxious to get in touch with my owners. I believe I also asked him where he lived. Q. Did you ask him where you could go to protest? A. I am not quite certain if they were the words. They were to that effect anyway. Q. Did you ask him whether he could help you to do these things? A. Not help me to do it. Q. To tell you where? A. To tell me where. Q. What did he say? A. He told me as near as I remember that there were no officials left in Darwin, that
1266 they had all vacated the town. Q. What did you say? A. I told him that it was of much importance to me to get something done about it and let the owners know what had happened because I had been unable to send a telegram from Darwin. I told him that I was going to tell my owners to give notice of abandonment to the insurers because I thought the ship was a constructive total loss. Q. What did he say? A. He said 'Do you mean to say that you are abandoning the ship' or something very nearly like it. Q. What answer did you make to that? A. I do not know that I made any answer because it struck me as strange that he did not understand what I meant when I told him that I was going to give notice of abandonment. It struck me that Captain Williams had taken it that I was

going to tell my owners that I was abandoning the ship." Were those questions asked at that time and did you give those answers? A. Yes, sir, I believe they were and I believe the answers are perhaps nearly what I said. I don't believe I used those words because I am not a lawyer and things like constructive total loss I have got to look it up in a book before I know what it means.

Q. Will you dispute the accuracy of this testimony as read to you from this transcript? A. Yes, sir.

Q. In what respect? Just your use of the word "constructive total loss", is that it? A. I have read that testi- 1268
mony through and I know that questions asked me and answers given by me are totally missing in that.

Q. Did you at any rate inform Captain Williams in this conversation on February 24th that you were anxious to send a cable to your owners and inform them that they should give notice to the underwriters of the abandonment for the purposes of the insurance? A. I spoke to him about getting in touch with my owners and sending a telegram to my owners. The rest of it I doubt whether I discussed with Captain Williams or not. I doubt whether I used those words there or not.

Q. I think you testified that you knew that Captain 1269
Williams had something to do with salvage? A. There was a Major Brenn that was appointed by Lieutenant Colonel Jones to take care of all cargo. He came aboard the ship to get an idea of how the cargo was stowed before we docked at Darwin jetty and he told me that the Australian Navy had sent down to Adelaide for a salvor to come up and raise some submarines that they had sunk outside Darwin and in the vicinity of Darwin. I found out later and afterwards that Captain Williams was the man. I found out also that there was no submarines found, it was just rock ledges that they had taken to be sunken submarines and Captain Williams was walking around Darwin with nothing to do.

Q. Well, in any event you did learn while you were still at Darwin that Captain Williams was an experienced man on salvage, is that true? A. About his experience I knew absolutely nothing. I knew that there was such a man called up and I learned afterwards that that was Captain Williams. I had no idea at the time that he was the man that had been connected with the salvage of the *Niagara*.

Q. Did you have any conversation with Colonel Petterson about Captain Williams, who and what he was, when
1271 you met Colonel Petterson? A. I don't recall. I spoke to Colonel Petterson maybe once or twice after this thing had happened.

Q. You knew that Captain Williams was salvaging cargo, of course? A. Yes sir, I knew he was attempting to or had been asked to do it.

Q. Well, as a matter of fact you knew he was doing it, didn't you, while you were still at Port Darwin? A. Yes sir, they were doing it.

Q. You never, as I understand it, at any time asked Captain Williams as to the possibility of his salvaging the vessel? A. No, sir, I did not.

Q. And your testimony is that in no conversation with
1272 Captain Williams at any time did you even discuss the raising of the vessel, is that correct? A. I don't believe I did.

Q. In fact you thought that the vessel was finished and raising was impossible, did you not? A. I thought the vessel was finished but I never thought that it was impossible to raise her. I put it on the record as soon as I got to Melbourne that the easiest thing in the world was to raise the ship if you had the necessary equipment.

Q. Did you not tell Captain Williams in one of your conversations with him at Port Darwin that the *Portmar's* back was broken and that she could not be raised? A. No, sir, I never did.

Q. Did you not also tell him that you would not allow your chief mate to work with Captain Williams because the ship was finished? A. That is a direct lie. In the presence of Colonel Petterson and Captain Williams I called Mr. Bullock up—you will later on have him for a witness—I told Mr. Bullock to do anything in his power to help Captain Williams with all the gear and material that he could find in the ship, to get the guns out of the ship and help the American Army as much as possible.

Q. At any rate, you personally did not even think of raising the vessel, is that correct? A. Personally I could 1274
not do anything. It would take pumps and steam to do it with.

Mr. Collins: I move to strike out the answer as not responsive.

Q. (Repeated) At any rate, you personally did not even think of raising the vessel, is that correct? A. I discussed with the mate and the chief engineer every day the possibilities of raising the ship. We were all three of one opinion that it would not take much to raise her.

Q. Were you asked this question and did you give this answer, at the bottom of page 21 of the testimony in the 1275
salvage suit: "In those circumstances did you think it was worthwhile raising her? A. I do not know that I ever weighed whether it would be worth it or not because the way it looked to me was as if everybody was going to leave Darwin, I did not think anybody was going to bother with anything sunk in the Bay". Did you give that testimony? A. I believe I did.

Q. Did you make any inquiries as to whether the necessary pumping equipment and a donkey boiler could be obtained at Melbourne or any other port? A. By the time I got to Melbourne or shortly afterwards I heard that Captain Williams had gotten the pumps from the Australian Government who were transporting them through the

desert. There were none in Darwin at the time and none within long distances of Darwin.

Q. Did you make any inquiries was my question? A. I did.

Q. Of whom? A. The Australian naval authorities, anybody along the waterfront that knew anything about ships at all.

Q. What Australian naval authorities, who were they? A. There was Lieutenant Gollar, he was the man I knew the best. He was Naval Control officer of Darwin. There
1277 was a couple of commanders there, one Rairden, I believe, and another one I can't think of his name now—they told me that there was no equipment of any kind at Darwin.

Q. When did you first hear of any attempt being made to raise the ship? A. Possibly a day or two before I heard that she was raised.

Q. When was that? A. I believe that was on the 13th of April. I may be wrong as to the date.

Q. I have forgotten whether you testified whether you were or were not furnished with a copy of the charter agreement at San Francisco before commencing this voyage? A. Yes, sir, I was.

Q. You had a copy of the charter agreement? A. I had
1278 one, yes, sir.

Q. When did you first give a statement to Mr. Murphy or Mr. Campbell as to the facts in this case?

Mr. Murphy: I object to that as immaterial and not proper cross-examination. Statements given to counsel are in preparation for trial and not admissible. He should not be examined with regard to it.

Mr. Collins: I am not calling for the statements. I think it is proper cross-examination in view of the amendments to the libel which were made upon the examination of this witness.

A. Will you state that question to me a little more clearly, please?

Q. (Repeated) When did you first give a statement to Mr. Murphy or Mr. Campbell as to the facts in this case? A. That was shortly after I arrived in New York from Australia. I don't know the date. It must have been in April 1943.

Q. And you told them all the facts then as you recalled them, I presume? A. I believe I told them everything they asked about. I know that I told them the facts as near as I knew them.

Q. You told them all the orders which you had received from various officials at the various ports all along the 1280
route? A. I believe so, yes, sir.

Q. From whom did you get your orders to proceed in this convoy to Koepang? A. From the Australian Naval Control aboard the U. S. Cruiser *Houston*.

Q. They were by the Australian Naval Control officer and not Captain Rooks of the Houston? A. I believe Lieutenant Gollar was the man that handed each of us four masters a copy of the orders. Afterwards Captain Rooks explained those orders and went through them from one end to the other with us sitting around his table.

Q. Did you protest against taking this voyage? A. No, sir, I did not.

Q. I suppose it was quite useless, is that your under- 1281
standing? A. When I get an order from proper authorities with the sanction and understanding and knowledge of American authorities who are present then I don't protest in time of war when I believe it is for the sake of prosecuting the war.

Q. I quite understand that. I just want your plain statement in the matter. You were ordered by those whom you considered competent military authorities to go on this voyage to Koepang and there was nothing else for you to do, is that correct? A. No, sir.

Q. I say there was nothing else for you to do? A. Well, I wouldn't say there was nothing else for me to do. If I said "Gentlemen, I am not going to take your ship, I believe it is all foolishness" then they probably would have——

Q. Put you in jail? A. Done something to me and put another man in my place, and a better man.

Q. You saw the vessel after she had been towed to Brisbane, of course? A. Yes, sir.

Q. You went all over her? A. Yes, sir.

Q. She had been looted while she was at Port Darwin after the bombing of practically everything that was loose on her, is that correct? A. That's right, sir. I saw some of the looting going on.

Q. Did you make any attempt while you were at Port
1283 Darwin to have a watchman or guard put aboard the ship? A. Yes, sir, I did in this way, that I went to the Australian Naval Control and told them everything about it and I told them it was up to them to put a guard aboard the ship and shoot anyone that tried to steal stuff in the future.

Q. Who was looting her, Captain? A. Captain Williams' gang, the Australian Navy.

Q. Do you mean to say the Australian Navy people themselves were stripping this ship? A. Yes, sir, I mean exactly that.

Q. Did you see them? A. Yes, sir, I did. The chief mate of mine, he was before we left Darwin aboard an
1284 Australian corvette where they served him breakfast out of the ice chest that they had taken out of our ship. There is lots of things, gentlemen, that would have appeared in that protest and in the testimony from Melbourne if it had not been for the sake of the war going on. The powers that be they have evidently thought that it would be best to keep it out of the evidence. Maybe it is, I don't know, that is not for me to say.

Q. Well, this record is going to be long enough, Captain, so just suppose you answer my questions. There won't be very many more. By the way, those fifty holes in the hull which you told Mr. Mount had been plugged before you left Port Darwin, they were plugged by the ship's crew, were they not? A. Yes, sir.

Q. And the largest of all the holes was only about 8 by 4 inches, was that your recollection? A. I don't believe,

sir, that I ever measured any of them exactly but there was holes of about that dimension. I don't believe I have ever said eight inches anyway. It seems to me that I counted the largest hole about seven inches.

Q. Were they mostly made by the aerial gun fire? A. Yes, sir.

Q. Who was the American Consul with whom you say you talked at Sydney after your arrival there on December 30, 1942? A. I couldn't tell you his name. There were three or four Consuls in the office, or Vice Consuls. I spoke to all of them. They were what they pretended to be. 1286

Q. Well, I mean it was either the Consul or one of the Vice Consuls, is that correct? A. Yes, sir.

Q. It is my understanding that from the time you arrived in Australia all the orders you received with reference to the cargo you got from the American military authorities? A. Yes, sir.

Q. And your orders as to where you should go from one port to another were from the naval authorities? A. Australian or British naval authorities, yes, sir.

Q. At Brisbane whom did you see at the American Consulate? A. I saw the American Consul himself, Mr. Ragland.

Q. That was in regard to trying to get a message to your owners, is that it? A. Yes, sir. 1287

Q. Did you consult any American Consul or representative of an American Consul with reference to joining this convoy to Koepang? A. There was no chance to do so.

Q. There were none around? A. There was no American consular representatives in Darwin.

Q. Well, were there any stationed there ordinarily? A. No, sir, Darwin was only a little pearl fishing town.

Q. I meant to ask you one further detail about your anchorage at Port Darwin at the time of the bombing. Were there other ships anchored near you? A. Yes, sir.

Q. How near were they to you? A. May I take a look at one of my notebooks?

Q. Certainly. A. (Referring to notebook) It says here that from the first anchorage in Port Darwin after we came

back from Koepang as is marked on that chart there the *Meiggs* which was——

Mr. Murphy: Indicating "*Portmar* anchored 12,55 P M February 18, 1942" on the chart.

A. (Continuing) it says that the *Meiggs,* which was an American Army transport, bore 257 true about 2,000 feet, that the American ship *Mauna Loa* of the Matson Line bore 220 true about 2,300 feet and the Australian motorship *Tulagi* bore 174 about 1,900 feet.

1289 Q. Were there any vessels anchored near you off Channel Island or in the place where you finally beached the vessel? A. No, sir.

Q. What was the position of Colonel Jones in the Army there at Port Darwin, if you know? Was he commander of this Field Artillery Regiment, or one of them? A. Mr. Collins, I don't exactly know.

Q. Well; if you don't know that is all right. I can check up myself as a matter of fact, and will. Do you know who at Port Darwin was the highest ranking officer in the United States Army Transport Service? A. No, sir, I don't. He must have been aboard the transport *Meiggs.*

1290 Q. What was the position of Colonel Plant, whom you mentioned? A. I wouldn't like to make any mistake and I wouldn't like to make any statements about things I don't know exactly—he was a colonel in the American Army in charge of all Board of Transport in Australia, I believe.

Q. Was he at Port Darwin during your stay there? A. No, sir.

Q. You first met him at Melbourne? A. Yes, sir.

Mr. Collins: I have a few more questions, not a great number. I suggest we adjourn for lunch.

Recess taken to 2 P M.

AFTER RECESS, 2 P. M.

Present as before.

AXEL MICHELSON resumes the stand.

Cross examination continued by Mr. Collins:

Q. Captain, to whom did you say you applied in the Australian Royal Navy to have the ship guarded from looting or other damage after you got to Port Darwin? A. It was a commander in the Royal Australian Navy. It was the same fellow that signed the receipt that we have seen here. I am not certain about his name. 1292

Q. That is the receipt for the documents that you turned in? A. Yes.

Mr. Collins: Referring to Libellant's Exhibit 5 for identification.

Q. At any rate, nobody was put aboard the ship, is that correct? A. No, sir, not to my knowledge.

Q. You spent two or three nights there yourself, did you not? A. Yes, sir. 1293

Q. Of course there was no looting going on at that time? A. I wouldn't be too certain of that. I found in my quarters that they had even used the top maul trying to get into the safe. They had knocked the lock off, ruined the combination, the top maul was lying alongside the safe the next time I saw it.

Q. Were there any other officers on board these nights you spent on the ship? A. One night the chief mate was there and I believe also the chief engineer.

Q. Did I understand you to say that the looting was done partly by Captain Williams' men? A. Yes, sir, that is what I said.

Q. Did you report that to your solicitors, Messrs. Malleson Stewart & Company, in connection with the salvage suit? A. Yes, sir.

Q. You did not attend the trial, I take it, the trial of the salvage suit—or did you? A. No, sir, they took a deposition just like they are doing now and that is all I knew of the salvage suit.

Q. You don't know whether the defense was asserted to the claim of the salvage people that they looted the ship, do you? A. No, sir, I don't.

1295 Q. At any rate, there is no question that a great deal of the ship's equipment was taken? A. No, sir, no doubt whatever.

Q. You saw the results of that when you visited the ship in Brisbane? A. Yes, sir.

Q. Will you tell us to what extent the ship had been stripped of equipment and so forth? A. Yes, sir. All the dry stores, steward's stores that were above water were taken. The machine shop was looted of everything in it. We had a fine machine shop, we used to do as much of our own engine repairs as possible and the company had fitted us up a fine machine shop with all kinds of tools and drills, lathes, wrenches—practically everything was taken that could be

1296 moved. They took also all the meats and boatswain's stores such as several brand new manila lines that we had never used, all the spare rigging we had, all the spare rope we had, all the spare canvas we had, all the paint, all the tools we had, they took everything out of the hospital, they looted the wireless shack and demolished the radio bearing instruments we had, they took all my books, all the charts belonging to the ship, all navigational equipment, all the clocks—in fact, Mr. Collins, they took everything that could be moved, they didn't overlook anything that I saw.

Q. I take it then in your opinion as you saw the vessel at Brisbane, which was presumably her condition at the end of this looting at Port Darwin, she was quite unfit for service as a merchant ship? A. Absolutely.

Q. In fact, she was probably unfit for service as a ship of any kind, is that correct? A. As a ship, yes, I wouldn't say as a storehouse or as a hulk.

Q. I say as a ship? A. Yes, sir, as a ship.

Q. All navigational equipment had been removed or destroyed? A. Yes, sir. Also they had taken everything in the steward's department.

Q. Radio equipment had either been removed or destroyed? A. Yes, sir.

Q. All parts were gone? A. Yes, sir. I saw once coming out to the ship I saw one of our brand new mooring 1298
lines being passed over the side into an Australian craft of some kind. As soon as they saw the launch coming they made off. I don't know who they were. The naval officer in Darwin that I asked to have the ship guarded, he says "Captain, what would you do about it?" so I said "I would hang just about a dozen of the first ones caught doing it, then it would stop itself". They looted the slop chest, all the tobacco, all the cigarettes.

Q. After the bombings in the Timor Sea were any bilge soundings taken? A. Yes, sir.

Q. Did you have a bilge sounding book? A. Yes, sir.

Q. That you no longer have? A. No, sir.

Q. But there was no unusual amount of water in the 1299
bilges, I understand? A. No, sir, there was not.

Q. How high did the water get in the holds after the bombings at Port Darwin? A. I don't know for certain because I was on the bridge at all times and how high it really got I don't know because then we took her down to the place where she finally was left and the water kept increasing until she sank.

Q. When you spoke of the list that the vessel had, was that list based on any clinometer or just your judgment? A. No, sir, the clinometer, the two we had, they were each on a compass, the standard compass and the steering compass, and they were gone with the compass. That is just my judgment.

1300 Q. So long as you were going back to the vessel in her last anchorage or the place of her beaching off Channel Island there were no Japanese air raids down there at that time, were there? A. Yes, there were Japanese air raids every day over Darwin and down over the camp. They even dropped a bomb now and then in the harbor, but there was no regular air raid over Darwin Harbor any more because there was nothing more to be had.

Q. How far was the position of your ship off Channel Island from the town of Darwin itself? A. I believe between six and seven miles.

1301 Q. How many times in all—this is probably in your direct testimony but just let me summarize it—how many times in all did you go back to the *Portmar* before you finally left for Melbourne? A. I cannot be absolutely certain. I had a notebook that I have lost. I took down what happened day by day.

Q. What is the notebook to which you have been referring during your testimony here? A. Oh, that is all the notes that I have gotten, partly from what the chief mate and other members of the crew had noted down and partly from what I remember, so I wouldn't forget it.

1302 Q. You mean it was written up after the occurrences, is that it? A. Yes, sir.

Q. Just what did you mean when you said that when you and your crew finally left Port Darwin you were put on the train almost forcibly? A. I meant that we had no choice in the matter. They had the transportation for us, they came down and ordered us to put our few belongings we had, which wasn't very much, on the trucks. The men that had guarded us in camp, they were there and saw that we went aboard the trucks and there were soldiers boarded every truck with us and took us down to the railroad. When we came down there there was Colonel LaRue, an Australian liaison officer, Captain Degrucia, and a couple of the lieutenants from the 147th Field Artillery—I don't know their names.

Q. I take it that the A y and military authorities were in pretty complete charge at Port Darwin from the time your vessel arrived there and the Japanese attack occurred, is that right? A. Were in complete charge?

Q. Yes. A. Yes, sir, absolutely.

Q. You said that in your attempts to get back to Port Darwin from Melbourne you once went to Colonel Plant's office? A. Yes, sir.

Q. And your testimony was that Plant let it be understood that there was no chance of your going back. Just what did he say? A. I don't remember, I don't remember 1304
his exact words.

Q. Did you talk to him? A. Yes, sir.

Q. The Army did in fact take over the possession and complete control of your ship, did they not? A. Yes, sir.

Q. Was that before or after you left Darwin? A. That was after I left Darwin.

Q. At what time is it your understanding they did take over possession and complete control? A. We went into this yesterday and I believe it was said that it was on the 17th of August. I am not certain of the date though.

Mr. Murphy: 17th of November.

Mr. Collins: I object to counsel interpolating any 1305
suggestion. I am not talking about the requisition of title.

Mr. Murphy: I submit that what the captain said was perfectly and apparently in error and if Mr. Collins wishes to have errors in this record so as to play on them let him say so.

Mr. Collins: I submit that I am entitled to cross examine this witness without interruption from counsel. I submit my question is perfectly clear and it has nothing to do with the requisition of title.

Mr. Murphy: All right. Do you wish the captain's answer to stand as the 17th of August?

Mr. Collins: Yes.

Mr. Murphy: All right, I will re-examine him.

1306 Q. Did you meet an American Army official in Australia named Barnes? A. No, sir, not that I know of.

Q. You don't know who he was? A. No, sir.

Q. Do you not know that even in the early part of May 1942 this vessel and everything in connection with her were under the orders of Colonel Plant, Chief of the Water Section of the Army Transport Service? A. I did not know anything about the understanding or agreement between the American Army officials and the Australian Navy and Captain Williams. I did not know anything certain at all.

1307 Q. Do you know that it was the United States Army officials who arranged with the Commonwealth Salvage Board of Australia for the towage of the *Portmar* from Port Darwin to Brisbane? A. Yes, sir, I gathered that much.

Q. Those arrangements were made in early May 1942, isn't that correct? A. I don't know, sir.

Q. Did you state to Colonel Plant while you were in Melbourne that you had advised the Calmar Steamship Corporation that the *Portmar* was not worth salvaging? A. Perhaps I did. Once or twice I was up to see Colonel Plant in the company of my solicitors.

1308 Q. Was that before or after the vessel had been raised? A. I don't know for certain.

Q. It is my understanding from what you told me before the luncheon recess that you were first informed concerning Captain Williams' qualifications as a salvage man when you talked with an American Army Major Brenn? A. That's right.

Q. About when was that? A. That was while Brenn, he came aboard to prepare for the discharge of the cargo when first we came to Darwin.

Q. And from what Brenn told you then Captain Williams had had extensive experience in salvaging vessels, is that correct? A. He never said no such thing to me. He said that they had sent for a fellow that had come up from the South Coast.

Q. To salvage submarines? A. To salvage submarines, yes, sir.

Q. But you knew he had been considered capable of salvaging submarines? A. I never gave it a thought.

Q. And you never made any inquiries whether he could salvage the *Portmar*? A. No, sir, I was not interested whatsoever.

Q. In fact you thought that time that the *Portmar* could not be salvaged?

Mr. Murphy: Now just a minute. What does counsel mean by "at that time". First he has the captain talking about when he first came to Darwin with the cargo—what do you mean by "that time"? 1310

Mr. Collins: At the time of his conversation with Major Brenn.

Mr. Murphy: That means when he first got there with his cargo before the *Portmar* had been hurt at all.

The Witness: Yes, sir.

Q. Oh, this was before the *Portmar* had been damaged? A. Yes, sir.

Mr. Murphy: I do not mind cross examination but we are getting nowhere with confusion. 1311

Mr. Collins: All right, you can comment before the Court. The Court is absent at the moment. I am not trying to mislead the witness. I probably misunderstood him. My understanding was that he was referring to the conversation with Major Brenn when the cargo was being salvaged.

The Witness: No, sir, this was before anything had happened to the *Portmar* at all and before we had taken any cargo out of the *Portmar* when we first arrived at Darwin.

Q. Even then you were informed by Major Brenn that Captain Williams had been employed to salvage submarines,

is that correct? A. Yes, sir, he told me that they had sent up to get a man to raise the submarines. I don't believe he used the word salvaging.

Q. And you knew that Williams was salvaging the cargo —you saw that yourself? A. I saw that myself after the disaster had happened to the *Portmar*, yes, sir.

Q. And he did get out all of the Army trucks and other military equipment? A. I take it he did, I don't know, I was not there.

Q. You had no discussion with him at all about the possi-
1313 bility or salvaging the ship herself? A. No, sir.

Q. It was never even mentioned? A. No, sir.

Cross examination by Mr. Mount:

Q. Captain, I have just three questions here that I meant to ask you: As you lay on the beach at Channel Island following the raid on February 19th the forward part of the vessel was pretty free from water, wasn't it? A. Yes, sir.

Q. Now, when you saw the vessel at Brisbane did it show then that she was still free from water or were there traces of water having been in her, if you noticed, forward?
1314 A. No, sir, there was water in No. 1 and 2 but I could not draw any conclusions from that because the hatches were not there and it may be rain water, it might be sea water for all I know, I don't know, there was a little water in both 1 and 2.

Q. At Brisbane? A. At Brisbane when I first saw her, yes, sir.

Q. But when you left Darwin the forward hold did not have water in so far as you knew? A. No, sir.

Q. And the cargo was well stowed? A. Not according to Calmar standards they were not. They were hurriedly loaded, things that a seaman would not stand for at all the Army officers said that's all right, we haven't got time to worry about that.

1315

Q. Well, do you remember in your testimony at Melbourne saying that there was not much movement in the cargo because it was well stowed? A. I don't remember, sir, that that came up in the testimony but perhaps it did.

Q. Captain, I show you page 41 of the master's testimony in the salvage suit at Melbourne: "Q. And as the cargo included wheeled vehicles, guns and what not, that would, of course, tend to maintain the list on the ship, would not it? A. Yes. There was not very much movement because they had all been secured as well as possible"? A. Yes, sir.

1316

Q. That was the question and the answer? A. That was the question and the answer, undoubtedly so. May I say one word?

Q. Yes, please do. A. That does not mean that the cargo was well stowed by the stevedores or well secured by the stevedores because they did not secure anything. It means that the chief mate and I after the cargo was in the ship got together and I told the mate to secure that cargo as well as possible and he did so with the crew.

Q. Just one more question: Did you hear anything about negotiations between the United States Government and Calmar Steamship Corporation to sell the vessel to the Government after the raid at Darwin? A. No, sir, I did not.

1317

Cross examination by Mr. Collins:

Q. Isn't it a fact, Captain, that the Army after removing its cargo at Port Darwin forthwith took complete charge of the vessel because it considered it abandoned? A. I don't know, I was not there.

Q. Well, it was abandoned as far as you were concerned—I mean as far as your physical and direct contact with it was concerned, after you left Port Darwin for Melbourne, isn't that correct? A. No, sir, it is not.

Re-direct examination by Mr. Murphy:

Q. You were asked on cross-examination, Captain by Mr. Mount as to the distance from Darwin to Wyndham according to the log and you gave a mileage figure from the log. Will you please clarify that for me and explain how you reached that figure just so that we are sure of it. You can take the log and point out to me how you reached the figure you gave from Darwin to Wyndham? A. (Referring to log) I find under February 5th at noon, eighty miles from the point of departure. I made a mistake.
1319 Under the following date I find a distance of 120—that is 200—200, that is the total distance from the time of leaving or taking departure outside of Darwin, the total distance from entrance to entrance was 200 miles instead of as I said before 280. I had forgotten those figures and the only thing I can go by is what the log says.

Q. That is all right, I just wanted to get it straight on the record. A. From Wyndham entrance and up to Wyndham there was a long distance, a long narrow shallow crooked river.

Q. Captain, when you got on the train at Darwin on March 10th to go overland to Melbourne how did you
1320 travel? First can you tell us how that trip was made? A. Yes, that trip was made in open railroad trucks on a narrow gauge track as far as Birdum.

Q. Then what? A. Then the Australian Army furnished us transportation from Birdum through the desert to Alice Springs.

Q. What kind of transportation did the Australian Army furnish you? A. Military truck.

Q. And then what happened at Alice Springs? A. We were put on another narrow gauge railroad.

Q. Where did that take you? A. That took us to Adelaide.

Q. And then what happened? A. In Adelaide we got off the train.

Q. Now, let me stop at Adelaide for a moment. Can you give me an estimate of how much time you were on the original open narrow gauge railroad cars from Port Darwin to Birdum—how long was that section of the trip? A. Two days.

Q. And then from Birdum to Alice Springs in the Australian Army trucks how long were you on the road—about, you don't have to be exact? A. I have forgotten. When I say two days on the railroad that does not give an indication of the distance because sometimes they would stop for a few minutes.

1322

Q. That is all right. Suppose you just tell me then the approximate time you were on each form of transportation. Tell me how long you were on the Army trucks from Birdum to Alice Springs. A. I wouldn't like to make any mistake, but eight or nine days.

Q. Approximately? A. Yes, sir.

Q. And from Alice Springs to Adelaide by another narrow gauge railroad, how long was that section of the run? A. Two days.

Q. And then from Adelaide to Melbourne what kind of transportation was there? A. Rail again.

Q. And how long was that trip? A. We left Adelaide in the evening and we arrived at Melbourne the following morning.

1323

Q. I don't know whether I asked you, Captain, but I would like to ask you again if I missed it—what was Captain R. Douglas Taylor's position or occupation at Brisbane? A. Surveyor American Bureau and the British Corporation, also to Norwegian Veritas.

Q. All right. Now that you say it I think you have covered it. And Mr. A. G. Horn, what was his position? A. He was at the head of an engine works, I believe he was one of the owners of it, I am not quite certain. He was a marine engineer, held all British certificates, he had shortly before I had come to know him come back from Singapore where he had been ranking engineer officer in a British cruiser that had been sunk by the Japanese.

Q. And was he an engineer officer in the Navy? A. Yes, sir.

Q. With what rank? A. Commander.

Q. Returning for a moment to your trip across the desert, do you know how long a run that was across the desert from Birdum to Alice Springs in miles—can you make an approximation? A. Say a thousand miles.

Q. You were questioned by Mr. Collins as to your attempt to note protest after the bombing in the Timor Sea. Now, when you got back to Port Darwin in the convoy
1325 before the attack of February 19th did you attempt to note any protest, when you first got back? A. No, sir, I could not do it.

Q. Did you go ashore when you first got back? A. No, sir, I did not.

Q. What was the first time that you got ashore and attempted to note a protest? A. That was after I had seen Captain Williams and Colonel Petterson down at the ship and I went back in the launch.

Q. Was that after the vessel was beached? A. Yes, sir.

Q. In answer to Mr. Collins on cross examination as to when the United States Army took complete possession and control you mentioned the date of August 17, 1942. What
1326 event do you associate with the date August 17, 1942? A. I meant the formalities of passing ownership from my company to the Government but I know that I was mistaken in the date because that was a lot later on.

Q. By the formalities you have mentioned do you mean the actual requisition? A. Yes, sir.

Q. And may we understand that whenever the requisition actually took place, that is what you meant? A. Yes, sir. I had it in my mind, you see, without going over it yesterday, it was the 17th of some month.

Q. And is it your recollection that that was after August? A. Yes, sir, it is my recollection that that was later than August, considerably later.

Q. Was any special equipment required to get the cargo out of the *Portmar*? By that I mean the field pieces, ammu-

nition and military equipment? A. No, sir, none but what we had in the *Portmar* if it had been left there.

Q. Now a few questions about your testimony in the salvage suit in Australia: Captain, I will read you again that testimony so that you will know what I am talking about: (Reading) "Now, as a sailor, tell me this: Unless somebody did something to that ship after you had left her would you expect the ship ultimately to become a total loss or not? A. She could have laid there for a year or even longer and it would not have made any difference one way or the other". Now, Captain, I want to read you the next 1328
question and answer: "Q. Although she was lying under a strain? A. A certain strain, yes." What did you intend the Court to understand by your statement in the first answer just read that it would not have made any difference one way or the other? You may look at the question and answer there in the transcript—I have marked it in blue at the beginning and end. A. Yes, sir, I believe that is the answer I gave the Court.

Q. That's right, that is what you said this morning. Now, what did you mean by the statement that it would not have made any difference one way or the other if she had laid there a year or even longer? A. I mean that she was in a well-protected place as far as shelter goes. I mean 1329
that she had been damaged just about as much as she would have been if she had laid there quite a long while more.

Q. Now the next question to the one Mr. Mount read you was "Although she was lying under a strain? A. A certain strain, yes." Now, were you asked that question and did you make that answer? A. I believe so.

Q. Now, that strain that you spoke about, what was that strain? A. That strain was the lifting of the forward end of the ship when the tide came in twice a day. I thought then and I believe yet that as long as she stood it the first few days without breaking up she would stand it for a long time to come.

Q. Now on page 26 Mr. Mount read you the following question and answer: "You say there was no risk of that ship breaking its back; that is your story, is it? A. There was no more chance of breaking her back, as you call it, as there was the first or second day she came in if she had laid there for a year". Are we to understand that that expresses your opinion as you have just answered in your previous answer to me? A. Yes, sir.

Q. Now, Captain, following the questions which Mr. Mount read to you on pages 32 and 33, I wish to read you
1331 the next question on page 33 following what Mr. Mount read. The question is as follows: "And you would have, of course, plugged up the holes in the ship? A. Yes. Q. Were there any pumps and steam to be got in Darwin, do you know? A. I do not believe there was". Were those two questions asked you and did you make those answers? A. Yes, sir.

Q. If you had had the necessary equipment to commence a salvage operation on the ship what would be the first thing you would try to do? A. I would have plugged up the holes in the ship's side.

Q. And then what would you do? A. I would have put
1332 the pumps on and pumped the water out.

Q. At the time you were at the vessel in Port Darwin, say as of the last day you saw her, was it your judgment that the plugging of the holes and pumping the vessel out was a hopeless task or a difficult operation? A. It was in this way, that there was absolutely no way of getting either the pumps or the steam.

Q. I will now ask you to assume that you had the necessary pumps and that you had a craft alongside to supply the necessary steam, would the actual raising of the vessel to a floating position have been difficult? A. No, sir.

(The stenographer reads the following questions and answers to the witness:

"Q. What did you say? A. I told him that it was of much importance to me to get something done

about it and let the owners know what had happened because I had been unable to send a telegram from Darwin. I told him that I was going to tell my owners to give notice of abandonment to the insurers because I thought the ship was a constructive total loss.

Q. What did he say? A. He said, "Do you mean to say that you are abandoning the ship?" or something very nearly like it.

Q. What answer did you make to that? A. I do not know that I made any answer, because it struck me as strange that he did not understand what I meant when I told him that I was going to give notice of abandonment. It struck me that Captain Williams had taken it that I was going to tell my owners that I was abandoning the ship." 1334

Q. Now, you have heard those questions read again, Captain? A. Yes.

Q. And you said this morning that those were the questions asked and those were your answers. Now, I will read you the following question and answer: "You thought that he misunderstood you or else did not understand? A. Yes." Was that question asked you and did you make that answer? A. Yes, sir. 1335

Q. Now, Captain, this morning at one point in Mr. Mount's cross examination, you made the remark that you had not seen this testimony before and later, I believe, in answer to Mr. Collins, you said, "I have head that testimony through." How do you explain those two statements? A. I remember I told Mr. Mount that I had read it through. I don't believe that I ever said that I had never seen it before. If I said so, I meant that I had never seen it before now because I never saw it in Australia. It was not ready when I left Australia. If there is any doubt about it or if I made a mistake, I want to correct it now.

Q. Well, let us put it this way: When did you first see this copy of the testimony that was shown to you this morning? A. I saw that in your office here the other day.

1336

Q. Was that the first time you have read through a transcript of the testimony you gave in the salvage case? A. Yes. That is with qualifications again.

Q. What are they? A. Because a day or two after I had been up to the High Court in Australia Mr. Trumble had gotten a preliminary report like you got there and I sat down with him and he went over it and I noticed that this one here has missing several things that were said and happened in Court that is not in this one there. I also asked
1337 Mr. Trumble if that was to stand as he read it to me and he says, "Captain, it won't". He says, "The counsel on the other side and I will have to go over this and we will have to make some compromises" because some of this stuff that had been said in Court was not for the public records, I believe.

Q. Then are we to understand that you did not see what was shown to you as a final and complete transcript of the testimony before you left Australia? A. That's right, it was not a final report, no, sir.

Q. And that you did not see any transcript again of your testimony in the Australian salvage case until you came to this office the other day? A. No, sir, I have been
1338 to sea since and I have not had time.

Q. Is that right? A. Well, I have been to sea ever since but I have not been near an office—in fact I have never thought of the case since or bothered about it.

Recross examination by Mr. Collins:

Q. Do I understand that in your years as master at sea you never heard of the term "constructive total loss" of a vessel? A. Yes, sir, I heard it lots of times.

Q. I thought you told me— A. I don't dare to define it yet though unless I take a textbook or a law book of some kind and read up what it exactly means. I don't know, Mr. Collins, I am no lawyer and I don't pretend to be.

Q. The only reason I asked you the question was because in one of your answers to me on my cross-examination you at least expressed doubt as to the accuracy of the transcript because you said you did not know what the term "constructive total loss" meant, you did not use that term? A. I do in a general way, I know there is such a thing on a shipowner, he can on the loss of his ship abandon his ship to the underwriters.

Q. One other question, Captain. Your answer to my question as to when the Army took possession and control of the *Portmar* was August 17, 1942? A. Yes, sir, I believe 1340
it was.

Q. Then after cautioning by Mr. Murphy you were led to agree with him that you meant the time she was taken over by requisitioning of title on November 17, 1942? A. Mr. Collins, I am not led by anybody, even my attorney, to say things that I don't believe to be so.

Q. I did not think you would be. A. No, sir. I am not; I don't have anything to conceal and I am trying to tell the truth as near as I know it.

Q. In that connection let me ask you to look again at Libellant's Exhibit 40—do you remember your testimony in connection with that? A. Mr. Collins, at that time things 1341
were so confused that I did not know who was in charge of the ship. He drove me off the ship or kept me from going on the ship. He also did the same thing to Lloyd's surveyor.

Mr. Murphy: Who is "he"?

The Witness: I mean Captain Williams or his agents.

Q. Let me merely ask you this: It is true as you testified on your direct examination in the course of which this Libellant's Exhibit 40 for identification was marked that when you did attempt to go aboard the ship at Brisbane about the middle of August 1942 you were stopped by an American Army sentry and turned back. You then went to

see an American Army officer who gave you a pass, you were again turned back, and you finally were permitted on board only by going to your agents, then to Colonel Grimm in charge of the Army Transport Service at Brisbane, then got this pass from the Commonwealth Salvage Board, Exhibit 40 for identification, and only then were you permitted to go aboard the ship—that is correct, isn't it? A. Yes, sir.

Q. So the Army certainly was in possession and control or exercising possession and control at that time in the middle of August 1942?

1343

Mr. Murphy: I object to that as calling for a conclusion.

Mr. Collins: All right, I will withdraw the question.

Q. As to what control they exercised up to August 14, 1942 you personally did not know because you never saw the *Portmar*, as I understand your testimony, from the time you left Port Darwin for Melbourne and until you saw her again at Brisbane in the middle of August 1942? A. No, sir, that is right.

1344

By Mr. Mount:

Q. Captain, do you know who made temporary repairs at Brisbane? A. Yes, sir, I believe that was the American Army with help from the War Shipping Administration.

Mr. Collins: I move to strike that out as merely the captain's belief. I don't know whether it is so or not.

The Witness: It is so, Mr. Collins.

Mr. Collins: It may be, I don't know.

Re-direct examination by Mr. Murphy:

Q. Are we to understand, Captain, that in answer to Mr. Collins you stated that you did not know what happened

as to possession and control of the *Portmar* between the time you last saw the *Portmar* at Port Darwin and the time you next saw the *Portmar* at Brisbane, is that right? A. I have a good general idea but as to exact knowledge I have none.

Q. When you first got to Brisbane on the day the *Portmar* arrived there did you try to go on board? A. Not the first day.

Q. Was it the next day? A. I believe so.

Q. And can you tell us what day of the month that was, what the date was? If you want to refresh your recollection you can look at anything you wish. A. (Referring to notebook) That would have been one of the very first days in August most likely, 1942. 1346

Q. And what happened when you tried to get on board the *Portmar* the first time? A. The sentry told me I could not go aboard.

Q. And on that occasion did you have Colonel Plant's pass with you? A. Yes, sir.

Q. Did the sentry recognize that pass? A. No, sir.

Q. To refresh your recollection I show you Libellant's Exhibit 39—was that the Colonel Plant pass which you showed the sentry? A. Yes, sir.

Q. And the sentry did not recognize that pass? A. No. 1347

Q. And the sentry did not permit you to go aboard the ship even though you had that pass? A. No, sir.

Deposition of Joseph E. Bullock—Libelant's Exhibit 50.

JOSEPH E. BULLOCK, being duly sworn and examined as a witness on behalf of the libellant, in accordance with the requirements of Rule XLIV of the United States District Court, testified as follows:

By Mr. Murphy:

Q. Where do you reside, Mr. Bullock? A. I reside in Laurel, Nebraska.

1348 Q. And where were you born? A. I was born at Black Mountain, North Carolina.

Q. What is your present occupation? A. Ship master.

Q. Do you hold a master's license? A. Yes, sir.

Q. How long have you held that master's license? A. Since 1940.

Q. How long have you been going to sea? A. Since 1932.

Q. Has all your experience been in the deck department or in the engineroom? A. I spent three years in a State training school and in that school I was part of the time in the engineroom.

1349 Q. In your actual experience at sea have you served on deck or in the engineroom? A. On deck.

Q. Who is your present employer? A. Calmar Steamship Corporation.

Q. Are you now master of a vessel owned by Calmar Steamship Corporation? A. No, sir.

Q. Is the vessel operated by Calmar Steamship Corporation? A. No, sir.

Q. Who is your present employer? A. Calmar Steamship Corporation.

Q. Who pays your wages and your salary now? A. Calmar Steamship Corporation.

1350 Q. Are we to understand that you are master of a ship at the present moment? A. No.

Q. When were you last master of a ship? A. Last Friday.

Q. And what ship was that? A. The steamship *Marymar.*

Q. And who operated that ship? A. The Calmar Steamship Corporation.

Q. Are you waiting for another command now? A. Yes, sir.

Q. How long have you been in the employ of Calmar Steamship Corporation? A. Ten years.

Q. On November 21, 1941 were you in the employ of Calmar Steamship Corporation? A. Yes, sir, I was.

Q. In what capacity? A. Chief mate.

Q. Of what ship? A. Steamship *Portmar.*

Q. On November 21, 1941 where was the *Portmar*? A. That is a little too long ago for me to remember right the date.

Mr. Mount: Let him look at the log.

Q. You may refresh your recollection from the log. A. (Referring to log) November 21st the ship was at sea.

Q. Bound for what port? A. Bound for the port of San Francisco. 1352

Q. When did she get to San Francisco? A. She arrived at San Francisco on November 23rd.

Q. And did she start to load a cargo when she got to San Francisco? A. Yes, sir, she did.

Q. As chief officer of the vessel did you know what that cargo was? A. In a general way, yes, sir.

Q. What was it? A. It consisted of aviation gasoline and general equipment for the United States Army.

Q. And where was that cargo consigned? A. Consigned to Manila, Philippine Islands.

Q. To the U. S. Army at Manila? A. Yes, sir.

Q. Did you have a manifest for that cargo? By manifest I mean a detailed manifest setting forth each specification of each particular kind of cargo and quantity? A. No, sir. 1353

Q. When did the vessel sail from San Francisco for Manila? A. (Referring to log) She sailed on November 28th.

Q. Were you present when the master received his sailing orders for that voyage? A. No, sir.

Q. Do you know where his sailing orders came from? A. Yes, sir, I believe I do.

Q. Where did they come from? A. They came from the United States Navy.

Q. Do you know in what form they were given to the captain? A. Yes, sir.

Q. What form was it? A. They were written.

Q. Were they open or were they enclosed in anything? A. They were sealed when I first saw them.

Q. Where did you first see them? A. I first saw them in the captain's office right after we had taken departure.

Q. Did the Captain open the orders? A. Yes, sir.

Q. Did you see those orders? A. Yes, sir.

Q. In a general way what did those orders consist of? A. The orders consisted of the route that the ship was to follow to her distination at Manila giving a number of positions or points through which she was to pass.

1355 Q. Did you have access to those orders in plotting the various courses of the vessel? A. Yes, sir, I did.

Q. Were those orders followed from there out on the voyage? A. They were followed until three or four days after the war had been declared.

Q. Did you receive any orders as to radio silence on the *Portmar*? A. The night that war was declared or the night after war was declared we received a message in code from the United States Navy and this coded message among other things instructed us to maintain radio silence.

Q. Would that be approximately December 8, 1941? A. It would be the night between the 7th and the 8th, I couldn't say exactly what hour it was, but I helped decode

1356 the message.

Q. In the sealed orders the captain got were there any instructions as to radio silence? A. I don't remember.

Q. Do you know whether the captain had any orders as to radio silence before you got this coded message from the Navy on the night after war was declared?

Mr. Collins: I think we ought to object to that on security grounds. It seems to me it is going into something which is not relevant in this case as to instructions of that character being given by the Navy before war was declared. I don't think we ought to go into it.

Mr. Murphy: I am perfectly willing not to go into it. I was simply bringing out all the facts. On

your statement that it does not apply it suits me. On that basis I withdraw the question.

Q. Now, what date was it when you received orders changing the orders as to course which you received in sealed form on sailing? A. December 11th.

Q. Tell us what happened on December 11, 1941. A. On December 11th the captain called me to his cabin and told me that he had received a coded message from the Navy.

Q. Did you have anything to do with that coded message? A. Yes, I did, I assisted in decoding it. 1358

Q. In a general way what did that message say? A. It instructed the master to change the route of the vessel and report to the American Naval Liaison officer in Suva, Fiji Islands.

Q. Did that message say anything about taking the orders from the British or the Australian Naval Control officer at Suva? A. No, sir.

Q. What date did the *Portmar* arrive at Suva? A. (Referring to log.) The *Portmar* arrived at Suva on December 20th.

Q. When the *Portmar* got to Suva to whom did the master report so far as you know? A. If I remember, after we had anchored in Suva Harbor in the night or late afternoon December 20th some American naval personnel came on board and talked to the captain in his quarters. I assume that he reported to them. 1359

Q. Did you ever see any British or Australian naval officers come on board? A. Yes, sir, the following day we went to the dock to take on water and I remember the British naval officer coming aboard with this American Naval Liaison officer.

Q. Did they both speak to the captain? A. Yes, sir.

Q. Were you present? A. No, sir.

Q. Did you hear either of those officers, either the British or the American, give any orders to the captain as to what he was to do? A. No.

1360 *Deposition of Joseph E. Bullock—Direct.*

Q. Did you see any written orders which were given to the captain? A. Yes, sir.

Q. Do you know where he got those written orders? A. To the best of my recollection they were signed by either some British or Australian naval officer in Suva.

Q. And what did those orders tell the master to do? A. They told the master to take his ship to Sydney, Australia.

Q. Did the *Portmar* maintain radio silence from there on? A. Yes, to the best of my knowledge she did.

1361 Q. When did you leave Suva? A. (Referring to log) We left Suva on the 22nd of December.

Q. And when did you arrive at Sydney? A. We arrived at Sydney the 30th of December.

Q. Did you go with the master on shore to report to any military authorities there? A. No, sir.

Q. Did any military authorities come aboard the vessel and speak to the master in your presence at Sydney? A. Not in my presence, no, sir.

Q. Did you see any written orders on board the vessel for procedure of the *Portmar* from Sydney? A. No, sir—from Sydney?

1362 Q. Yes. A. Yes, I did see them.

Q. Who had those orders? A. The captain did.

Q. Was there any signature on those orders, if you remember? A. Well, I cannot remember whether there was a signature but I know that the orders were the same as the others had been in the past, they gave the ship a definite route and the authority of the Royal Australian Navy behind them.

Q. Is it your recollection that they were written orders from the Royal Australian Navy? A. Yes.

Q. Where did they tell the *Portmar* to go? A. They directed the master to take the *Portmar* to Brisbane.

Q. While you were at Sydney was there any discussion between you and anyone from shore regarding the cargo? A. Yes, sir, there was.

Q. What was that? A. I remember that some military representative of the United States Army came on board to determine the nature of our cargo exactly and it was then I discovered that the master did not have a manifest— as I said before I did not have one. We had on board the vessel three United States Army non-commissioned officers and it was learned at that time that one of them had a complete manifest of the cargo which he had been directed to deliver to some authority when the vessel arrived at Manila. This American Army representative after examining the manifest and looking at the cargo we had on deck returned to 1364 shore that same day.

Q. He what? A. After he had examined the manifest and the cargo we had on deck he returned to shore that same day.

Q. Was any cargo discharged from the *Portmar* at Sydney? A. No, sir.

Q. When did you leave Sydney? A. (Referring to log). We left Sydney on the 2nd of January.

Q. And when did you arrive at Brisbane? A. We arrived at Brisbane on January 5th.

Q. Now tell us what happened with regard to the cargo at Brisbane. A. At Brisbane the cargo was partly discharged from the vessel so that it could be re-allocated 1365 apparently and a large part of it was returned to the vessel with some of it being left ashore and other cargo left in its place.

Q. Do you know who gave the instructions as to what cargo was to be re-loaded and what cargo was to be left ashore? A. The United States Army was supervising the unloading and loading of the cargo throughout.

Q. Were any orders received at Brisbane so far as you know as to where the vessel was to go from Brisbane? A. Yes, sir, we received written orders there too.

Q. From whom? A. From the Royal Australian Navy.

Q. Where did those orders tell you to go? A. They directed the master to take the vessel to Darwin, Northern Territory of Australia.

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Q. When you left Brisbane what did your cargo consist of? A. Our cargo consisted of the same quantity of aviation gasoline and miscellaneous supplies for the United States Army.

Q. On what date did you leave Brisbane? A. (Referring to log) We left Brisbane on the 9th of January.

Q. Did you go direct to Port Darwin? A. No, sir.

Q. What happened? A. If I remember, we stopped over at Thursday Island.

Q. Were any orders received to put into Thursday
1367 Island? A. Well, the orders directed the vessel to proceed via Thursday Island but we had a pilot for the inside channel behind Barrier Reef, he came aboard at Brisbane and was to be debarked at Thursday Island and upon arrival at Thursday Island I remember the naval authorities there placed the vessel in convoy and we had to wait for some time for this convoy to be made up.

Q. When the convoy was made up did you go on to Port Darwin in the convoy? A. Yes, sir.

Q. What date did you arrive at Thursday Island?

Mr. Collins: Isn't this all covered in the master's testimony?

1368 Mr. Murphy: It is.

Mr. Collins: I mean as to the routing?

Mr. Murphy: Well, we are almost at Darwin now.

A. We arrived at Thursday Island on the 15th of January in the afternoon.

Q. And when did you leave Thursday Island? A. We left Thursday Island the afternoon of January 16th.

Q. In the convoy? A. Yes, sir.

Q. And did you have a military escort? A. Yes, sir, we had a naval escort of two corvettes as I remember.

Q. When did you arrive at Port Darwin? A. We arrived at Port Darwin January 19th.

Q. Did you go to a pier or did you anchor when you got to Port Darwin? A. We anchored.

Q. How long did you lie at that anchorage? A. As I remember it was some time because the harbor was congested with vessels that had priority at the only dock there. (Referring to log) We docked the vessel January 31st.

Q. Under whose orders did you go into the dock? A. Under the orders of the harbor master who was an officer of the Royal Australian Navy.

Q. Did you discharge cargo at Port Darwin? A. Yes, sir, we did.

Q. How much cargo did you discharge? A. As I recall we discharged all of our cargo with the exception of about 1370
1700 drums of gasoline.

Q. Is there anything in your log about the number of drums that you held on board at Darwin on the discharge on January 31st or after that date? A. (Referring to log) No, sir, there is nothing in the logbook as to the quantity.

Q. It is your best recollection that you held 1700 drums of aviation gasoline on board, is that right? A. Yes, sir. In addition to that we——

Q. Wait a moment. Under whose instructions and at whose orders was that cargo discharged? A. The United States Army was issuing the orders and supervising the loading.

1371

Q. I think you started to say you re-loaded. Under whose orders did you re-load some cargo? A. Under the same people, United States Army.

Q. What did you re-load? A. We loaded some more gasoline and some additional lubricating oil.

Q. About how many drums did you have on board when you finished re-loading? A. It was supposed to have been 2100 drums altogether.

Q. That would be how many drums of lubricating oil? A. 100.

Q. That would be 2000 drums of gasoline and 100 of lubricating oil? A. Yes, sir.

Q. Did the vessel receive any orders as to where to go with that gasoline and lubricating oil? A. Yes, sir, she did.

Q. What were those orders? A. They were orders to the master to take the vessel to Wyndham.

Q. Were they written? A. To the best of my recollection they were.

Q. Who gave those orders to the master? A. They were signed by an authority of the Royal Australian Navy.

Q. Did they include any instructions as to where to go after she got to Wyndham? A. I believe they did, they instructed the vessel to return to Darwin.

Q. On what date did you leave Port Darwin for Wyndham? A. (Referring to log) The vessel left Darwin February 4th.

1373

Q. Did you have a military escort to Wyndham? A. Yes, sir, we had a Royal Australian Navy vessel escorting us to the entrance to the Bay outside of Wyndham.

Q. What day did you arrive at Wyndham? A. We arrived at Wyndham February 8th.

Q. Did you discharge cargo there? A. Yes, sir, we did.

Q. What did you discharge? A. We discharged 2100 drums of gasoline and lubricating oil.

Q. That is all the gasoline and all the lubricating oil? A. Yes sir.

1374

Q. Was the ship then empty except for dunnage? A. Yes, sir.

Q. What did the vessel do then? A. The vessel returned to Darwin.

Q. What day did you leave Wyndham? A. We left Wyndham on February 10th.

Q. When did you arrive at Darwin? A. We arrived at Darwin February 12th.

Q. Was that return from Wyndham to Darwin pursuant to the written orders the master received before leaving Port Darwin for Wyndham? A. Yes, sir.

Q. On the way back from Wyndham to Darwin did you have military escort? A. We did for the last half of the voyage.

Q. When you arrived at Port Darwin on February 12th did you go to a dock or did you come to anchor? A. We came to anchor.

Q. On whose orders? A. As I recall we were given orders to anchor by blinker signal.

Q. From where? A. From the Royal Australian Navy.

Q. After you came to anchor in Darwin did you ever go to a dock in Darwin there? A. Yes, sir, we did.

Q. When? A. February 13th.

Q. At about what time? A. Shortly before 8 o'clock in the morning. 1376

Q. Did you get any orders as to going into the dock? A. Yes, sir, we did.

Q. What were those orders and from whom did they come? A. Well, I did not witness the giving of the orders personally, didn't see anything of it.

Q. Did anyone come on board the vessel? A. Yes, sir.

Q. Who? A. Some military authorities.

Q. Of which service? A. Royal Australian Navy.

Q. After that did you move into the dock? A. Yes, sir, we did.

Q. And what happened there? A. There we loaded a——

Q. Well, first did you discharge anything when you got to the dock that morning? A. Yes, sir, we had a good deal of dunnage in all of the holds which had not been cleaned up. 1377

Q. Was that dunnage discharged? A. Yes, sir, it was.

Q. On whose orders? A. That was on the orders of the United States Army who was supervising it.

Q. After that did you load anything? A. Yes, sir, we did, we loaded another cargo.

Q. What was it? A. It consisted of military supplies belonging to the United States Army and the Royal Australian Army. We also loaded roughly 300 United States Army personnel.

Q. Were there any field pieces included in the materiel which you loaded at Darwin that day and following that day? A. Yes, sir.

1378 Q. What were they? A. I have no technical knowledge but they told me that they were 75-millimeter field guns and 37-75 and 37-millimeter field guns, their ammunition and all necessary equipment.

Q. Do you remember the unit of the troops which you took on board? A. As I recall they were 147th Regiment Field Artillery or the 148th, I cannot recall which.

Mr. Mount: Let us agree it was the 148th.

Mr. Collins: I think that is correct, I wouldn't swear to it. It is in the captain's testimony.

1379 Mr. Murphy: The captain said the 148th.

Q. What kind of material was loaded on board belonging to the Australian Army? A. It consisted of tentage and barbed wire.

Q. Was there anything loaded on deck belonging to the Australian Army? A. Well, I didn't know at the time it belonged to the Australian Army but I learned later it belonged to it—it was a launch, heavy motor launch.

Q. Was the name of that launch the *Nevbet*? A. Yes.

Q. When did you finish loading that cargo? A. We finished loading that cargo February 14th.

1380 Q. 1942? A. Yes, sir.

Q. And what did the vessel do then? A. The vessel proceeded from the dock into the stream of Port Darwin.

Q. Did you come to anchor? A. Yes, sir.

Q. Did you load anything while you were at anchor? A. Yes, sir, we loaded some ammunition.

Q. Any small arms? A. Yes.

Q. What? A. Yes, sir, we did, we loaded—if I remember we loaded rifles for all the men we had aboard and ammunition for all those rifles and the men, the Army personnel on board while they were unloading the rifles—

Q. While you were loading the rifles? A. While we were taking the rifles aboard they emptied the rifles from the boxes and re-packed their own rifles and we sent the boxes back in the lighter.

Q. You mean they re-packed their own rifles in the boxes—there was an exchange of rifles of the troops, is that what we are to understand? A. That is right.

Q. And they put the rifles they formerly had in the boxes and they were put back on what? A. On the lighter.

Q. Are we to understand that the troops came aboard at the pier? A. Right.

Q. Under whose orders were all this cargo and troops and material and equipment taken on board the vessel? A. To the best of my knowledge it was under the orders of the United States Army authorities in Port Darwin. 1382

Q. Do you know whether the master of the vessel received any orders as to where the vessel was to go from that anchorage? A. Yes sir, I know that he received orders.

Q. Do you know where he got the orders? A. Yes sir, after we had anchored the vessel in the stream that evening he was taken aboard the United States war vessel and there he received the orders.

Q. Was that the cruiser *Houston*? A. Yes, sir.

Q. Were you present on board the *Houston* when he received his orders? A. No, sir.

Q. After that did the *Portmar* get under way? A. The *Portmar* got under way very early in the morning of February 15, 1942. 1383

Q. About what time? A. About 1 o'clock.

Q. 1 A. M.? A. Yes, sir.

Q. Were you alone or were you in formation? A. We were in convoy formation.

Q. Can you name the other vessels in the convoy? A. There was the United States Army Transport *Meiggs*, the steamship *Mauna Loa*, the motorship *Tulagi*, the *Portmar*, the United States Cruiser formerly mentioned.

Q. Wait a moment—the four vessels you have named were merchant vessels? A. Right.

Q. Now, what was the military escort? A. As I recall it consisted of the United States *Houston*, the United States *Perry*——

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Q. Was that a destroyer? A. Yes, it was—and two Royal Australian naval vessels.

Q. Was there another destroyer? I suggest the *Preston.* A. I cannot recall, I only remember the one.

Q. In what direction did the *Portmar* proceed in that convoy? A. The convoy proceeded in a general westerly direction.

Q. As chief officer of the vessel did the master inform you where you were going? A. Yes, he did.

Q. What did he say? A. He said we were proceeding
1385 to Koepang, Timor.

Q. Will you describe the events of that voyage—what happened on the 15th of February 1942? A. We were proceeding in convoy when on the afternoon of February 15th we sighted some planes flying very high.

Q. How many? A. As I remember it was only one.

Q. Go ahead. A. And my attention was drawn to it by the noise of the anti-aircraft gun fire that was being directed toward it.

Q. Was there any anti-aircraft fire from your ship? A. Yes, sir, there was.

Q. What was it? A. The Army troops on board the vessel had set up four of their 50 calibre machine guns.
1386

Q. Were they in action? A. Yes, they were.

Q. Were any bombs dropped on the afternoon of February 15th by that enemy plane that you have described? A. I don't rightly know whether they dropped bombs or not.

Q. So far as you know did the *Portmar* receive any damage on the afternoon of February 15th? A. No, sir, not so far as I know.

Q. Did the *Portmar* continue on the voyage? A. Yes, sir, she did.

Q. Did the convoy disperse on the afternoon of the 15th when that enemy plane appeared? A. No, sir.

Q. Did that enemy plane go away after the anti-aircraft fire opened up? A. Yes, sir, it did.

Q. Did the convoy continue on the regular course? A. Yes, sir, it did.

Q. Now will you describe to us the events of February 16, 1942? A. About 11:20 on February 16th a large number of enemy airplanes were sighted and began to attack the convoy at once.

Q. How long did that attack last? A. That attack lasted about fifty-five minutes.

Q. Now, will you tell us the details as far as you remember them? A. Well, as I remember the bombers came in in one formation of 27 planes at first and this formation split up into three parts of nine each. At first they all tried to bomb the cruiser, which was the senior escort and 1388
had the most protection for the convoy in guns, and in due time they attacked all the ships in the convoy by dropping bombs.

Q. Did the convoy disperse? A. Yes, it did.

Q. All right, tell us the details as you remember them. A. We began to zigzag and make as much smoke as we possibly could just as all the other vessels in the convoy were doing.

Q. Where were you during these events, where were you standing? A. Part of the time I was on the shelterdeck, that is the top of the shelterdeck or the bridge deck.

Q. Just a moment. The shelterdeck is what? A. On 1389
top of the shelterdeck or the bridge deck.

Q. Is that exposed to the open air? A. Yes, sir.

Q. Would you call that the boat deck? A. No.

Q. Will you point out to us on this plan, Libellant's Exhibit 2, what you refer to as the place you were standing? A. My quarters were on the starboard side of that deck (indicating).

Mr. Murphy: Pointing to the area below the word "Saloon", just below the word "Saloon".

The Witness: Yes.

Q. And where were you standing? A. Part of the time I was standing right there (indicating).

Mr. Murphy: Witness points to a place which I will mark with a cross in a circle.

Q. On which side, port side or starboard side? A. Starboard side. That was previous——

Q. Is that open to the sky? A. No, there is a captain's deck extends over that.

Q. The captain's deck is above it? A. Yes. I was there when the planes first appeared and it was from there I watched them attack the cruiser *Houston*. During the
1391 remainder of that hour the attack was going on I cannot remember exactly where I was all the time but I do remember being in the, just inside of the shelterdeck cargo door on the starboard side on one occasion.

Q. Where is the shelterdeck? A. This is the shelter bridge deck right about where that arrow is (indicating).

Mr. Murphy: Witness points to the deck.

Q. Is it on the level of that arrow? A. That is right.

Q. Is that a deck where that arrow is? A. No.

Q. The deck is the line below it? A. That's right, that is the maindeck, this is the bridge deck or shelterdeck space
1392 (indicating).

Q. Is the deck you were standing on the maindeck running through the superstructure? A. Yes.

Q. Then we will mark the place where you were first "X" in a circle, "1", and then we will mark the place you have designated "X" in a circle "2"—is that right? A. Yes.

Q. Now will you describe what you saw? A. I remember watching the *Houston* as she was evading the bombs being dropped by enemy airplanes from the deck outside of my room in admiration, you might say, the way between the time the bombs were dropped from the airplanes she would change her course 180 degrees and thereby avoid them.

Q. By that you mean she would completely reverse her course? A. Yes.

Q. Was she going at full speed? A. Yes, that is what made it so interesting, when she put her wheel or her rudder hard over the wave thrown up by the sharp turn she made was almost as high as she was, but after they had tried unsuccessfully to bomb the *Houston* the planes broke up again in their formation and sometimes one plane and sometimes three in a formation would attack the *Portmar* among the other vessels.

Q. Will you say whether or not any bombs came near the *Portmar* and what you observed? A. Yes sir, when the planes began to attack or fly directly over the *Portmar* in a direct line with her we could see that they were attempting to bomb her. I took shelter in the position already shown you. 1394

Q. As "X" in a circle "2"? A. Yes. I was there when they dropped the first bomb. It was somewhere just astern of the vessel.

Q. Did you see that bomb land in the water? A. No sir, I did not see it.

Q. Could you feel it? A. Yes sir.

Q. Go ahead. A. And I was also there when they dropped some bombs near the port side, the after welldeck. 1395

Q. Could you see those bombs drop in the water? A. No sir.

Q. You were in the shelterdeck forward on the starboard side? A. Yes sir.

Q. Could you feel those bombs? A. Yes sir.

Q. At the time did you know how many there were that fell on the port side? A. No sir.

Q. Describe next what you observed? A. Immediately after that, after the bombs had dropped on the port side aft I came through the shelterdeck onto the after welldeck and found the decks full of water there that had been thrown up by the concussion of those bombs.

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Q. Where were you then when you saw the water that had been thrown up by the concussion? A. That would be on the port side of the after welldeck.

Q. Indicated on perhaps plan No. 3?

(Witness indicates).

Mr. Murphy: Witness puts an "X" in a circle "3" on plan No. 3.

Q. That was where you stood when you observed the water on the after welldeck? A. Yes. While I was there
1397 I looked over the side of the ship anticipating finding some holes in the ship's side from the bombs that were just dropped there but I could not locate anything at all. Then I returned to my station already indicated as position "2".

Q. That is the shelterdeck starboard side forward? A. Yes, and while I was there there was some bombs dropped close to the starboard side forward.

Q. Did you see those bombs fall in the water? A. Yes sir.

Q. How far away from the side of the ship were they? A. I should say they were between forty and fifty feet away at the most.

1398 Q. Could you feel the shock and concussion of those bombs? A. Yes sir.

Q. Describe what happened next. A. Well, as I remember it there were more bombs dropped, this time further aft on the starboard side.

Q. About how far from the ship? A. I did not see those fall but I do know they threw water on the deck.

Q. Did you feel the concussion? A. Oh yes.

Q. Did any bombs fall forward of the ship? A. Well, this group of bombs that I mentioned seeing fall, they were in a line you might say, the ones that I saw dropped.

Q. They were in a line on the starboard side? A. On the starboard side about abreast the foremast and they were forward of the ship.

Q. In a line toward forward? A. Yes.

Q. Did you see any bombs fall dead ahead of the ship? A. No sir, I did not see them.

Q. Did you hear them or feel them? A. Frankly it would be very difficult for me to remember two hours afterwards whether I saw any there. It seemed to me I do remember the ones on the starboard side, seeing those fall—as I say, they were in a line, in other words, they were a stick of bombs as they call it.

Q. About how many? A. I wouldn't say.

Q. You are not sure whether you saw any bombs after 1400
that fall forward of the ship? A. No.

Q. Did you go on the navigating bridge at all while all this was going on during this attack? A. I don't recall whether I was on the bridge during the actual attack or not.

Q. After the attack had finished did you make any examination of the ship's hull? A. Yes, sir, I did.

Q. What did you do? A. I examined the ship's hull immediately after each one of these sticks of bombs had fallen.

Q. How did you make that examination? A. By leaning as far out over the main deck rail as I could and peering
down at the ship's side. 1401

Q. Did you see any evidence of damage? A. No, sir, I couldn't see a thing.

Q. Did you make any examination of the inside of the ship? A. Immediately after the attacking planes departed I sent the carpenter to sound bilges.

Q. Did he make any report to you after he had sounded the bilges? A. Yes.

Q. What did his report show? A. He reported that his soundings were the same as they had been that morning at 8 o'clock—he sounds the bilges every morning at 8.

Q. Did you make any examination of the interior structure of the ship? A. Yes, sir.

time—in fact, you could not mistake it then, the ammonia system had been punctured and that whole area of the ship was unapproachable.

Q. After you observed the condition of the navigating compass what did you do? A. I remained with Captain Michelson for a while on the bridge and in the meantime it was brought to my——

Q. Was the vessel under way? A. Yes, sir.

Q. How was the captain navigating? A. He was navigating the vessel just by eye and by sighting the hills, the
1433 landmarks.

Q. What happened after that? A. Shortly after that information was brought to me there was a fire in No. 4 hold.

Q. Who reported that? A. The second officer.

Q. What did you do? A. I immediately proceeded to No. 4 lower hold.

Q. What did you find there? A. I found that some of the projectiles or bomb fragments had penetrated the ship's side and set on fire some of the things in No. 4 lower hold.

Q. Did you make any inspection at that time of the effect of the aerial fire and bomb fragments on the shell of the vessel? A. Yes, sir, the shell of the vessel in the way
1434 of Nos. 4 and 5 lower holds on the port side was perforated in a very great many places. Through some of them the water was pouring. The majority of them were in the area just above the water line of the ship.

Q. What was the general area in which the skin of the ship was perforated as you have described? A. Well, I should say that it extended from what I could see in 4 and 5 lower holds, it extended from the engineroom bulkhead aft along the port side as far as the bulkhead of the tunnel recess.

Q. On Libellant's Exhibit 2 there have been placed some red marks on the plan No. 3. Do those red marks approximately correctly represent the area in which the perfora-

tions of the aerial and gun fire were found by you? A. Yes, sir.

Q. What did you do about the fire in No. 4 hold? A. I extinguished the fire in No. 4 hold and returned as soon as possible to the forecastlehead because we were getting ready to anchor.

Q. On the way did you make any report to the master? A. Yes, sir, I reported to the master that the vessel's shell was perforated as I said before.

Q. Did you report that the vessel was making water in the holds where the shell was perforated? A. Yes, sir. 1436

Q. Did you report that the fire was under control? A. Yes, sir.

Q. Did you give any orders as to making arrangements to put the launch overboard? A. Yes, sir, when Captain Michelson told me that he intended to disembark the soldiers I put the sailors to work rigging a jumbo boom at No. 2 hatch in preparation for lowering the motorboat *Neubet* over the side.

Q. Did you say a jumbo boom or the jumbo boom? A. It was the only one on the vessel so it would be the jumbo boom.

Q. Did the crew succeed in getting the rigging of the jumbo boom in condition sufficient to operate? A. Yes, sir, they did. 1437

Q. Did the vessel thereafter come to anchor? A. Yes, sir, we anchored the vessel.

Q. At what point? A. Just to the westward of a small island in the Middle Arm of the harbor.

Q. On Libellant's Exhibit 4 the captain has placed a mark labeled "*Portmar* anchored 1.05 P. M. February 19, 1942". Does that correctly represent the position at which the *Portmar* anchored? A. Yes, sir, it does.

Q. After the vessel came to anchor what did you do? A. After the vessel came to anchor we lowered this motorboat *Neubet* over the side and began at once to carry the soldiers from the *Portmar* to this island which had some buildings on it.

Q. What did you find? A. I found that the rust and paint in the way of all joints between the frames and the shell plating between the strakes and bolts in the shell plating had been jarred and cracked so that you could see the spaces between them. You could also see where any loose rust on the under side of the decks or beams in the ship's structure had been jarred loose and shaken down in big piles in places where it could not be protected by paint and covered. I remember more particularly on the portside aft Nos. 4 and 5 lower holds that this was particularly noticeable.

1403

Q. What effect did the concussion of the bombs have on the general structure of the ship? A. Well, it seemed to me that the ship, all of the joints in the ship, as I say, showed a space between the two parts. It seemed to me that the whole structure had been loosened, you might say—in other words, the joints between the parts of the ship had loosened an appreciable amount so that the vessel's ordinary vibration was not the same as it had been, she was not as stiff as she had been.

Q. Did you go into the engineroom and make an examination there? A. No, sir.

1404

Q. Did you make a report to the captain? A. Yes, sir, I did, after the carpenter finished sounding his bilges and also after having made that examination of the interior of the hull myself I reported to the captain what I found.

Q. After that what did the *Portmar* do? A. According to my logbook which I was keeping at the time, the bombers departed at 12:15 P. M. We resumed our convoy formation at 12:30.

Q. And continued for how long? A. Continued right in this formation until 3:40 P. M. when the course was virtually reversed.

Q. At whose orders? A. That was at the orders of the senior officer of the escort, who was the commanding officer of the SS. *Houston*.

Q. Reversing course where did the convoy go? A. The convoy proceeded back to Darwin by way of coastal route.

Q. At what point did the convoy reach the north coast of Australia again? A. I don't recall exactly but I do remember passing the entrance to the Gulf of Cambridge right closely.

Q. Thence did the convoy follow along the coast to Port Darwin? A. Yes, right close.

Q. What time did you get back to Darwin? A. We got back to Darwin the morning of February 18th.

Adjourned to August 3, 1945, 10:30 A. M. 1406

Met pursuant to adjournment, August 3, 1945, 10:30 A. M.

Present as before.

JOSEPH E. BULLOCK resumes the stand.

Direct examination continued by Mr. Murphy: 1407

Q. When the *Portmar* got back to Darwin on February 18th did you go direct to a pier or did you anchor? A. We anchored.

Q. At whose order did the *Portmar* come to anchor? A. The *Portmar* anchored under the orders of the Royal Australian Navy Control at Port Darwin.

Q. Did they designate the position at which the *Portmar* was to anchor? A. Yes, sir, in Port Darwin they always signaled an exact location by giving us a bearing so many yards from the light house.

Q. Did the *Portmar* anchor at the position so designated? A. Yes, sir, she did.

Q. I show you a chart marked as Libellant's Exhibit 4 and on it is an indicated position with the legend "*Portmar* anchored February 18, 1942". Was that the position at which the *Portmar* anchored when she came back to Darwin at about noon of February 18, 1942? A. Yes, sir, that is the position.

Q. Did you receive any information from the Royal Australian naval authorities as to when you would go alongside the wharf and what you would do there? A. Yes, sir, right after we anchored we were told by the harbor master
1409 that we would very probably go alongside the dock that evening, disembark the troops and unload the cargo.

Q. Was that order carried out and did the *Portmar* do that? A. No, sir, later on that afternoon that order was withdrawn and we were told to be ready to go alongside the dock very early the next morning.

Q. Were any further orders received directing the *Portmar* to go alongside the dock and disembark troops and unload equipment? A. No, sir, the next morning very early that order itself was rescinded and we remained at anchor. Another vessel went in and took the berth at Darwin.

Q. Will you describe the events of the morning of Feb-
1410 ruary 19, 1942 while the *Portmar* lay at anchor in the position indicated on the chart as you have described? A. Shortly before 10 o'clock in the morning I was standing on the starboard side of the bridge deck right outside my quarters with the chief engineer and we heard a big roar made by a great number of airplanes approaching the port of Darwin from the direction of the sun. When we first saw them we imagined it would be American planes or Allied planes rather. The first of the planes we were able to see was a big formation of high altitude bombers and these bombers came in over the docks at Darwin. The first indication we had of them being enemy planes was the explosion of the bombs on the docks and around the town of Darwin. These planes continued to bomb the town and the airfield behind it and a number of the vessels at anchor from high

altitude. Very few minutes after they had begun their bombing our ship was attacked by dive bombers.

Q. Just pause a moment there. Did the bombing attack on the town and on other vessels have any effect on other vessels before the bombers attacked the *Portmar*? A. Yes, sir, one of the—we saw the ship that had taken the berth alongside the dock that we were supposed to have taken struck with a bomb. Shortly after that a big explosion went up, she rolled right over on her side, and we saw an American destroyer that had been one of our escorts in a recent convoy struck by dive bombers and she went up in a big 1412
burst of flame. We also saw the large Allied hospital ship struck by a bomb. She was lying in the East Arm of the harbor. We also saw a tanker that was lying quite close to the docks at Darwin struck, and high altitude bombers was also attacking the United States Army Transport *Meiggs* and she was sinking.

Q. At the time that attack began did Captain Michelson give you any order? A. Yes, sir, when the attack began I reported to him at once. He told me to swing out the lifeboats and lower them to the level of the rail on the bridge deck.

Q. Where were those lifeboats carried on the *Portmar* 1413
at the time you got that order? A. The lifeboats were hanging on their davits on the boat deck swung in.

Q. Which is the boat deck? A. The boat deck is the top deck in the midship section of the vessel.

Q. Is that the deck that is already labeled on that plan, Libellant's Exhibit 2, as the boat deck? A. Yes, sir, that is.

Mr. Murphy: Referring to the profile plan marked No. 1.

Q. And where was the point you were ordered to lower them to? A. I was ordered to lower them to the level of the rail at the bridge deck or shelterdeck (indicating).

Mr. Murphy: Witness indicates the deck next below the boat deck.

Q. Did you execute that order? A. Yes, I did.

Q. Did you succeed in lowering all the lifeboats to that level? A. Yes, sir, I did.

Q. When that was done did you make any report to the master? A. Yes, sir, I reported back to the master and he told me to stand by the anchor windlass on the forecastlehead in preparation for weighing anchor.

Q. Did you take station on the forecastlehead at the anchor windlass? A. Yes, sir.

Q. Were you able to observe from there what went on
1415 after that? A. Yes, sir.

Q. Will you now say what occurred after you got up to the forecastlehead? A. After I had arrived on the forecastlehead and been there just a few minutes the *Portmar* was attacked by Japanese dive bombers in succession. The first dive bomber released his bomb so that from where I was it looked as though it were going to strike the vessel on the port side abreast of No. 4 hatch.

Q. Where did that bomb actually strike? A. Well, the explosion of the bomb looked from where I was as though it had struck the side of the vessel. I couldn't see from there because of the tremendous amount of water thrown
1416 up by it.

Q. Was it very close to the side of the vessel? A. Yes, sir.

Q. On this chart, Libellant's Exhibit 2, the master has placed a mark opposite the plan of the ship numbered 5 at the foot of the chart and it is labeled "First bomb February 19, 1942". Do you agree with that position as the position where the first bomb fell? A. Yes, sir, that is my recollection as to the location at which that bomb fell.

Q. Was it very close to the port side of the vessel? A. Yes, sir, it was.

Q. Did any other bomb fall near the *Portmar* after that? A. Yes sir, this dive bomber was followed almost immediately by another one and his bomb also landed on the port side.

Q. Landed on the port side at what point? A. From where I was it looked as though it landed immediately beneath lifeboat No. 4.

Q. And which is lifeboat No. 4? A. Lifeboat No. 4 is the after lifeboat on the port side.

Q. On this chart, Libellant's Exhibit 2, the master has placed another mark labeled "Second bomb February 19, 1942", that mark being apparently on the plan opposite the bridge area. Is that the approximate position of the second bomb which fell? A. My recollection was that the bomb was further aft than that. In other words, it would be between the position marked as second bomb and first bomb. 1418

Q. Will you describe what the explosion of those bombs did to the *Portmar* from your own observation? A. From where I was on the forecastlehead you could see that the two lifeboats on that side, one of them completely disappeared and the other one was torn asunder, the garboard strakes had pulled away from the keel, the lifeboat nothing but a few strips of sheet iron and keel.

Q. What effect did those explosions have on the midship accommodations and pilothouse windows? A. I could see glass fly from the windows as the bombs exploded and bits of the bulwarks around the bridge come flying out with the concussion. One of the No. 3 booms fell at the same time and this boom came down through the awning of the port side of the captain's deck. I could see that one of the booms No. 4 hatch had also fallen, crashed into the boat deck. 1419

Q. Did you later make an examination to determine further what effect those bombs had on the ship? A. Yes, sir.

Q. Will you describe more particularly the effect of those bombs from your later inspection? A. From my later inspection I found that all of the wooden sheathing or ceiling inside of the quarters in the midship section of the vessel had been pulled adrift right away from the bulkhead and ceiling and all the locker doors had been pulled apart as it were by the concussion and a great many

holes had been put in the vessel's superstructure by the cannon fire from the attacking planes.

Q. I am coming to that. In addition to these bombs which you have described on that occasion was there any attack by aerial machine gun and cannon fire? A. Yes, sir, these dive bombers while they were attacking were firing their machine guns continuously. Subsequently to the attack by the two dive bombers we were attacked by a number of fighter planes which also maintained a very heavy fire.

1421 Q. Were you standing by the windlass during all that attack? A. I was standing by the windlass with the exception of a short while during which I came back aft on the starboard side to clear away the wreckage from one of the lifeboats. The falls of this boat had been cut and it had fallen in the water and I came in to clear the falls but this boat had been riddled so by machine gun and cannon fire that it fell in the water. While I was there the other boat standing in the falls also had a good many holes in it and I cleared that.

Q. Were those boats on the port side or starboard side? A. They were on the starboard side.

1422 Q. Did you see anyone lower those lifeboats? A. No, sir.

Q. Did you have anything to do with lowering them yourself? A. No, sir, except the clearing of the wreckage in one.

Q. By clearing the wreckage do you mean lowering that to the water? A. No, sir, the boat that I spoke of the fall had been cut and it had fallen in the water. By this time the tide began to ebb and strong current running past the ship, this boat dangling in the water with one fall.

Q. Did you hoist that boat back up again? A. No, sir, I had to lower it in, couldn't possibly hoist it in.

Q. Did you lower it away? A. Yes, sir, lowered it away.

Q. After that did you finally return to the forecastle-head? A. Yes, sir.

Q. What was the effect of this aerial machine gun and cannon fire on the decks of the vessel? A. The effect of the cannon fire was to riddle all of the boat deck, the captain's deck, it was powerful enough to drive through the steel decks in the amidship section of the vessel in a number of places also. The cannon fire would tear a big—whether one bullet or not—it would tear a hole that you could stick your head through when it struck the wooden deck, four-inch deck.

Q. Was there any effect on the radio shack and hospital? A. Yes, sir, the radio shack and hospital were in one house 1424
made of wood, and they seemed to be directly in line of fire of these cannons. It was in perhaps the worst condition of any of the quarters in the house amidships.

Q. What was the effect of the aerial fire or the bomb explosions on the standing and running rigging of the vessel? A. As I said before, the cannon fire had cut the boat falls, damaged them seriously. It also cut a great many of the shrouds, topping lifts and the booms, the guys of the booms—in two cases two of the booms topping lifts were cut through and they fell down, the others the majority of them were damaged to some extent, the jumbo boom guys, for example, were broken, they were seriously damaged as to be of no further use at all. 1425

Q. Was that jumbo boom you refer to the thirty-ton boom at No. 2? A. Yes, sir, it was.

Q. Did you say that the rigging of that boom had been damaged? A. Oh yes, sir, it was.

Q. When did this attack cease? A. The attack by dive bombers and fighter planes on the *Portmar* as I recall it ceased about 11 o'clock.

Q. And when that occurred did you receive any order from the captain? A. Yes, shortly after that attack had ceased the captain ordered me to weigh anchor.

Q. Did you do that? A. Yes, sir.

Q. Did you have any help? A. Yes, sir, I had the carpenter with me in the bow.

Q. Did you have steam on the windlass to perform that operation? A. Yes, sir, we did.

Q. Was there any effect of the aerial gun and cannon fire on the deck steam lines? A. Yes, sir, the deck steam line where it passes around No. 3 hatch had been punctured by this machine gun fire and the chief engineer had to make temporary repairs to it before we could do anything as this steam line supplied the windlass.

Q. Did the chief engineer effect sufficient repairs to enable you to get steam to the windlass? A. Yes, sir.

1427 Q. Did you raise the anchor with the windlass? A. Yes, sir.

Q. After the anchor was aweigh did you give any signal to the master indicating the anchor was up? A. Yes, sir, I did.

Q. After that did the vessel get under way? A. Yes, sir.

Q. Do you recall in what direction the vessel proceeded? A. The vessel proceeded down the Middle Arm towards the south.

Q. Was the vessel towing anything as she moved down the Middle Arm? A. Yes, sir, we had a number of make-

1428 shift life rafts we had put in the water when the attack began and those were made fast alongside the ship.

Q. In your observations of the condition of the vessel after the second attack did you observe the condition of the compasses? A. Yes, sir, as we were proceeding down after the anchor had been weighed and we were proceeding down the harbor the master called me to the bridge and told me that we were, that he was going to take the ship down the Middle Arm and anchor it as close as possible to a small island down that Arm so we could disembark the troops and he asked me to help in the navigation of the vessel by taking anchor bearings—not anchor bearings, I meant to say by taking bearings.

Q. Where did you go to take those bearings? A. I went to the standard binnacle which is located on the top of the wheelhouse.

Q. Is that the topmost deck of the vessel? A. Yes.

Q. On Libellant's Exhibit 2 there is an arrow pointing to a spot called compass bridge—was that the point where you went? A. Yes, sir.

Q. How did you find the standard compass when you got there? A. I found that the compass had been so badly damaged by the attack I could not possibly take any bearings on it. The glass was broken.

Q. Did you report that condition to the captain? A. Yes, sir.

Q. Did he come up and look at it? A. I don't know 1430
whether he did or not.

Q. After that what happened? A. After that we continued on down the Arm.

Q. Let me ask you, after that did you go down into the navigating bridge one deck below? A. Yes, sir.

Q. Did you see the navigating compass of the ship? A. Yes, sir.

Q. What condition was that in? A. That was in virtually the same condition as the standard compass. It could not be used at all because of the damage to it by machine gun fire and cannon fire.

Q. At this point let me ask you, did you observe any 1431
effect of aerial gun fire on ship's gear on the poop? Did the vessel have a poop mooring telegraph? A. Yes, sir.

Q. What was the condition of that? A. I had not been on the poop deck at that time.

Q. But later did you make an inspection? A. Yes, sir.

Q. And how did you find the poop mooring telegraph? A. I found that it had been damaged too. In fact there was hardly any place on the ship that had not been damaged to some extent by the cannon and machine gun fire.

Q. Was there a sounding machine on the ship? A. Yes, sir.

Q. What was the condition of that after the aerial attack? A. That had also been damaged.

Q. Did you observe the ship's refrigerating compartments and ice machine at a later time? A. Yes, sir, at a later

Q. Did any other craft come near the *Portmar*? A. Yes, sir, a small vessel belonging to the Royal Australian Navy came alongside shortly after we had begun to disembark the soldiers and began to assist us.

Q. What kind of assistance did she give? A. She just disembarked the soldiers.

Q. Was there any other trouble with fire on the ship? A. Yes, sir. Some time after that the fire broke out again.

Q. In what hold? A. No. 4 lower hold.

Q. What did you do? A. I again went into No. 4 lower
1439 hold and located the fire and put it out.

Q. Where was the fire? A. It was located in some more of the Army's tentings which was being carried in that space.

Q. While you were in the hold did you make any observation as to the entry of water into the vessel? A. Yes, sir, in the meantime the vessel had taken a port list and therefore more of the port side of the vessel being under water some of the holes that were above the water were now taking water very fast.

Q. Did you later find out anything about the port deep tank? A. Yes, sir, I later learned that the port deep tank had also been punctured.

1440 Q. Was water entering the port deep tank also? A. Yes, sir.

Q. Did you succeed in getting the fire under control? A. Yes, sir.

Q. Did you report to the master after that operation? A. Yes, sir, after that operation I reported to the master telling him that the vessel was making water a good deal faster.

Q. In what hold? A. Nos. 4 and 5 lower holds.

Q. After that what did the vessel do? A. Well, after that the captain told me to weigh anchor and told me that we were going to beach the vessel to try and prevent her sinking.

Q. Did you go to the forecastlehead? A. Yes, sir, I did.

Q. Did you weigh anchor? A. Yes, sir.

Q. Where did the vessel go then? A. The vessel proceeded just south of Channel Island at a slow speed.

Q. While you were so proceeding did the captain give you any orders as to navigation? A. Yes, sir, he asked me to the bridge to help him con the vessel because of the compasses being out of order and having nothing to steer by but landmarks.

Q. Did you go to the bridge? A. Yes, sir.

Q. How did you help him con the vessel? A. As I remember we used a lead line while we were beaching the vessel. 1442

Q. Did you make any observation of anything as you went along? A. Well, we had nothing but the hills in the distance, small rise of ground on Channel Island to go by.

Q. Were you looking at anything with respect to the water in order to determine depth? A. Yes, sir, we were using lead line.

Q. Did any other craft come to the *Portmar* to assist in disembarking troops? A. Yes, sir, while we were proceeding towards the shore to strand the vessel another small Australian naval vessel came alongside and moved the remainder of the Army personnel from the *Portmar*.

Q. Was the vessel under way at that time? A. Yes, sir. 1443

Q. Did the vessel take ground after that? A. Yes, sir. just after the soldiers had been disembarked we grounded.

Q. At what point did the vessel ground? A. The vessel grounded just to the south of Channel Island.

Q. On the chart, Libellant's Exhibit 4, the master has placed a point labeled "*Portmar* stranded 2.12 P. M. February 19, 1942". Does that represent the point where the vessel stranded? A. Yes, sir.

Q. And as to the time of stranding, what record have you of that? A. His time of stranding is the same as I have, sir.

Q. What is your time? A. 2.12 P. M.

Q. After the vessel was beached what did you do? A. As soon as the vessel was beached we began at once to try to stop the inflow of water in the vessel. We still had one of those homemade life rafts alongside and I put the carpenter in one and he was seated on that with axes and blocks of wood to drive plugs in the holes from the outside of the vessel. The remainder I went into No. 4 and 5 holds myself with axes and hatchets and blocks of wooden wedges and bags, sacking, to plug the holes from the inside of the vessel.

1445 Q. How did the vessel lie in her beached position? A. Right after she was beached she maintained a port list which she had before with her head towards the east.

Q. Under what part of her hull was she aground? A. She was aground under the stern.

Q. Which side? A. Starboard side.

Q. In about how much water there? A. I don't know.

Q. Were any soundings taken? A. Yes, sir, soundings were taken.

Q. Have you any record of the soundings? A. No, sir.

Q. Did the list of the vessel to port increase any after you beached the vessel? A. Not immediately after, no. Shortly after 5 o'clock it began to increase.

1446 Q. What was the action of the tide during the afternoon? A. When we beached the vessel the tide was still falling.

Q. As the tide went down what was the effect on the vessel? A. She remained at almost the same list for some time. As I said before, after 5 o'clock the list began to increase considerably.

Q. And to what extent did the list increase? A. Well, it increased to such an extent that after 5 o'clock it was difficult to get from the port side of the ship to the starboard side unless you had something to hold onto to help yourself across.

Q. What effect did that have on the intake of water into the vessel through the holes caused by the enemy attack?

A. That caused all of the holes on the port side to be submerged.

Q. In plugging the holes during the afternoon how many holes did you succeed in getting plugged? A. Well, we did not count them but as I said before we had two men on the outside of the vessel and anywhere from two to four other men and myself in the hold and we were continually making the plugs out of wood and driving them into those holes I should say from about 2.15 or 2.30 until we finally left the vessel because of the great list.

Q. Did you succeed in getting all the holes plugged up? 1448
A. No, sir, some of them were in behind the cargo or behind web frames and parts of the structure of the ship and we couldn't get at them.

Q. Did any vessel come alongside the *Portmar* at about 6 o'clock? A. Yes, sir, one of the small Australian naval vessels came alongside.

Q. Did anyone from that vessel come on board the *Portmar*? A. Yes, sir, the commander of that vessel boarded the *Portmar*.

Q. After that did the captain issue any order to you? A. Yes, sir, after that the captain told me to take my men out of the hold and to take them on board the small vessel that was alongside. 1449

Q. Did the captain issue any order to the chief engineer? A. Yes, sir, I was there when he told the chief engineer to release the steam from the boilers and cut out his fire.

Q. And then do what? A. And then leave the vessel.

Q. Did you go on board the Australian vessel alongside? A. Yes, sir.

Q. Did your men go with you? A. Yes, sir.

Q. Did any remain on board the vessel? A. No, sir.

Q. How about the engineroom force? A. They all left the vessel, sir.

Q. Did the captain give you any instructions after you got on board the Australian vessel? A. Yes, sir, after we

boarded the Australian vessel Captain Michelson told me that I was to go with the men to Darwin and to keep the men together as far as I could.

Q. At the time you left the *Portmar* was there any indication as to what might happen to the *Portmar*? A. Yes, sir, I was afraid the *Portmar* would roll over on the port side.

Q. Before you left the *Portmar* did you go anywhere on the ship with the captain? A. No, sir, I did not go anywhere.

1451 Q. Did you see anyone take any action with respect to an anchor of the *Portmar*? A. Yes, sir, I did.

Q. What did you see? A. I saw Captain Michelson let go the anchor.

Q. Which anchor? A. The starboard anchor if I recall.

Q. Are you sure? A. No, sir, I am not positive. I did see him let go an anchor.

Q. By that are we to understand that you are not sure which anchor it was? A. No, sir, as I recall I was in the—I had already boarded this small Australian vessel. That was the last act that Captain Michelson did before he left the vessel and from this small boat I could not see just

1452 which anchor he had let go.

Q. When you and your deck force and the deck engineer and his engine force were on board the Australian craft—by the way, what was the name of that craft? A. As I remember it was the *Vigilante*.

Q. While you were there where did the captain go? A. Well, the captain boarded the small motor launch Nevbet.

Q. Did he have anyone with him? A. Yes, sir, he had the boatswain and the carpenter and one able seaman with him.

Q. And what did the Vigilante do with you on board? A. The Vigilante proceeded out into deeper water where there was another Royal Australian naval vessel and all of the uninjured of the *Portmar's* crew who had been aboard the Vigilante boarded it and the Vigilante's com-

mander told me that he was taking the injured men to the hospital ship.

Q. And did you go on board this other ship? A. Yes, sir, I did.

Q. What did the Nevbet do with the captain and these three men on board? A. The Nevbet remained standing by the *Portmar.*

Q. Where did this other ship take you and your crew? A. She took us to Darwin.

Q. On landing at Darwin what did you do? A. On landing at Darwin I with the remainder of the crew 1454
reported to the headquarters of the United States Army.

Q. And what happened then? A. They provided us with transportation which carried us to a camp about seventeen miles south of Darwin.

Q. I omitted to ask you, during all this day February 19, 1942 what were the weather conditions? A. The weather conditions were fine and clear.

Q. Was there any wind? A. Very little.

Q. How was the surface of the water in the Bay? A. Calm.

Q. On arrival at the camp of the 147th Field Artillery —by the way, how far was that from Darwin? A. About 1455
seventeen miles.

Q. What did you do? A. Well, we arrived there as I recall it, after midnight., Someone in authority distributed us among three or four kitchens and brought out the cooks for the Army and they gave us something to eat and then we found a nice soft spot to sleep.

Q. What did you do that next day, February [illegible]? A. February 20th I obtained transportation from one of the Army officers of the Quartermasters Corps there and he took me back down to the port area at Darwin and I made an effort to get a boat to take me down to the *Portmar* as I knew Captain Michelson was still there.

Q. Did you succeed in getting down to the *Portmar*? A. No, sir, while I was there there was an aerial alert and all

the small boats when there is an aerial alert there they proceed as far from the port of Darwin as they could and hide in the mangroves, so I couldn't get a boat.

Q. What did you do then? A. After trying by all means to get a boat, the latter part of the day I returned to the Army camp.

Q. What did you do the next day, February 21st? A. February 21st I came back to the port area at Darwin and there I found a Colonel who was in charge of the regiment whose equipment we had aboard the Portmar and whose

1457 men we had on the *Portmar*.

Q. What was his name? A. As I remember it was Petterson.

Q. Go ahead. A. Colonel Petterson said that he was going down to the *Portmar* and that he had a launch and he would be glad to take me down.

Q. Did you go with him in that launch? A. Yes, sir.

Q. Was anyone else on board that launch? A. Yes, sir, there was a Captain Williams along with him.

Q. Did you see Captain Michelson after that? A. Yes, sir, when we arrived off Channel Island we found Captain Michelson aboard the launch *Nevvet*.

1458 Q. What did he do? A. He boarded the motor launch we were in and we all went together.

Q. Did you go on board the *Portmar*? A. Yes, sir.

Q. Did the captain go on board the *Portmar*? A. Yes, sir.

Q. Did anyone else go on board the *Portmar*? A. Yes, sir, Colonel Petterson and Captain Williams also came aboard.

Q. Did you make an examination of the vessel? A. Yes, sir.

Q. What did you find? A. I found that Nos. 4 and 5 holds and the engineroom completely flooded with water, that the quarters of the poop deck under the poop deck of the vessel were flooded, that the oil in the double bottom tanks had overflowed through the pipes and adhered to

every part of the vessel's superstructure that was above water either at low or high tide, every part of the vessel rather that was touched by the tide.

Q. Is the *Portmar* an oil-burning vessel? A. Yes, sir.

Q. With steam engines? A. Yes, sir.

Q. And at the time of the bombing attack of February 19th did she have fuel oil in her double bottoms? A. Yes, sir, she did.

Q. When you said the accommodations in the poop were flooded, where was the water level of the Bay? A. As I remember it the water level was not quite to the top of the 1460
poop deck throughout but the vessel had a port list and one could see by the line of oil that by high tide it came within I should say three feet of covering the poop deck on the starboard side, which would mean that the poop deck quarters were flooded.

Q. At about what time was it that you four went on board the vessel on the night of the 21st of February? A. I don't remember exactly what time but it was sometime very near to noon, 12 o'clock.

Q. On February 21st? A. Yes, sir.

Q. And how was the tide at that time? A. I don't remember exactly.

1461

Q. Did you and the master and the Colonel and Captain Williams go all over the ship as far as you could? A. Yes, sir, I was with Colonel Petterson and Captain Williams while they were making their examination of the vessel.

Q. Was there any discussion during that examination as to what was to be done? A. Yes, sir, Colonel Petterson who was in charge of the regiment to which that equipment belonged was very interested in getting it put back ashore.

Q. Where were the guns stowed on the *Portmar*, the guns belonging to that regiment or detachment that was on board the *Portmar*? A. All the guns were stowed in No. 4 lower hold with the exception of the machine guns which had been mounted on deck, and some of their spare parts.

1462 *Deposition of Joseph E. Bullock—Direct.*

Mr. Mount: May I interrupt just a second. Will you get the witness to explain what he means by No. 4 and No. 5 holds because the plan only shows 1, 2, 3 and 4.

Mr. Murphy: Right.

Q. Now, Captain Bullock, will you look at the plan, Libellant's Exhibit 2, and tell us what you mean by Nos. 4 and 5 holds? A. This is something I run into every time. On this type of ship we have always called this No. 1 as on
1463 the plan, this No. 2——

Q. As on the plan? A. As on the plan—this No. 3 (indicating).

Q. No. 3, pointing to cargo or fuel oil deep tank? A. That's right, but we speak of that as No. 3 hold, and this is No. 4 and 5 (indicating).

Q. Then 4 and 5 are the next succeeding holds after the engine space? A. That's right.

Q. Suppose we mark this as you have indicated with a large pencil figure "No. 4" and "No. 5"— is that right? A. That's right.

Q. Now, it is pointed out that in the plans down below, Nos. 3, 4 and 5, that is the plans being numbered that in ink
1464 for identification, we have No. 3 hatch and No. 4 hatch and we have a label "Hold No. 3". Are we to understand that you disregard that designation? A. I do.

Q. And you call that hold No. 4 and hold No. 5? A. That's right.

Q. And that hatch No. 3 goes into No. 4 hold? A. That's right.

Q. And hatch No. 4 goes into No. 5 hold? A. That's right.

Mr. Mount: Yes, we so understood it but we wanted it on the record.

Q. That being so, you say the field pieces were stowed in No. 4 hold? A. That's right.

Q. That is the hold next aft of the engineroom? A. Yes.

Q. Were those field pieces under water when you four made your inspection on February 21, 1942? A. Yes, sir, they were.

Q. Did you hear anyone say anything on that occasion about salving the vessel itself? A. No, sir.

Q. What was the condition of the engineroom at the time of your examination on February 21, 1942? A. I remember going to the engineroom door.

Q. And what did you see? A. And looking down into the engineroom. The water was almost to the top of the main engine cylinders. 1466

Q. How far is that above the engineroom floor plates? A. Well, I don't know just how far that is above but it is about one deck below the level of the maindeck, I should say seven feet perhaps below the level of the maindeck.

Q. Can you estimate for us the approximate height of that water in the engineroom if it reached the tops of the cylinders? A. It would be about this height (indicating on Libellant's Exhibit 1).

Mr. Murphy: Witness draws a pencil line on the deck above the words "Engineroom space" on Libellant's Exhibit 1. 1467

Q. Are you able to estimate the height above the floor plates of that line approximately? A. Well, it is drawn there in that plan measuring in the plan between sixteen and seventeen feet above the tank top.

Q. After that what did you do? A. After that I returned to Darwin with Captain Michelson and Colonel Petterson in the motor launch.

Q. And what did you do then? A. I accompanied Captain Michelson while he went to see the Senior United States naval officer at Darwin and while he went to see the Senior officer of the United States Army at Darwin.

Q. Did Captain Williams return to Darwin with you? A. No, sir, he remained on the *Portmar*.

Q. What transportation did he have? A. Well, near the situation of the *Portmar* there were several small craft of the Royal Australian Navy at anchor. He was associated in some way with them.

Q. What time of day was it when you left the *Portmar* to go back to Darwin? A. I don't remember the exact time but it was in the afternoon.

Q. On February 22nd did you return to the *Portmar*, the next day? A. I can't remember the exact dates now.

Q. Well, let me ask you did you go back to the *Portmar*
1469 after that visit of February 21st? A. Yes, sir, I did.

Q. Do you remember what date it was that you got back there and what you did when you got there? A. I do remember going back there with the launch *Nevbet*.

Q. And who was with you? A. Captain Michelson and one of the seamen.

Q. And what did you do when you got there? A. The seaman and I loaded the launch with bedding and personal belongings of some of the soldiers that had been on the ship and carried them back to Darwin where we delivered it to the United States Army and later on on that same day we returned to the *Portmar* where Captain Michelson remained
1470 taking with us some of the officers of the regiment to whom the equipment belonged.

Q. At that time was anything being done with regard to the cargo in the *Portmar*? A. Yes, sir, on that evening the Royal Australian Navy began to salvage under direction of Captain Williams the cargo of the vessel. They brought alongside a number of lighters and one of the auxiliaries of the Royal Australian Navy began to unload the equipment that was in the forward of the vessel.

Q. Was that work done in daylight or in darkness? A. No, sir, they only worked in darkness.

Q. Why? A. They were afraid of another Japanese aerial attack.

Q. Were there any aerial attacks on any of those visits you made to the *Portmar* on the harbor? A. I did not see

any aerial attack but I know there were several occasions on which reconnaissance planes came over, and there were alerts. I was present in the harbor on one of the dates when they had an alert.

Q. While you were ashore on those occasions did you see any indication of preparations to repel a Japanese invasion? A. Yes, sir, they had a large barricade built on the highway just outside of Darwin that extended as far as you could see from the highway and all of the civilian shops had been closed up and civilians had been evacuated from Darwin. The only authority there was the Allied military. I remember on one occasion going with Captain Michelson to the 1472 headquarters of the military authority there to obtain passes.

Q. Returning to the events of that day when you took the bedding and that personal property ashore and then went back to the *Portmar* with some officers of troops that had been on board, are you able to give us the date on which that was done? A. As I recall that was on the 23rd.

Q. Did you remain on the vessel that night? A. Yes, sir, we remained on the vessel that night.

Q. And what happened the next day? A. The next day we returned to Darwin.

Q. Was Captain Williams there on the vessel, the 1473 *Portmar*, on February 23rd? A. Yes, sir, he was there supervising the unloading of the Army equipment.

Q. Were they unloading any of the field guns from No. 4 hold that day? A. No, sir, they were not doing that, they were working in the part of the ship that was above water.

Q. What part of the ship was that, running from what point? A. They were working in No. 1 and No. 2 holds, that was forward of the midship section.

Q. Did the master give you any instructions as to working with Captain Williams or to assist him in any way? A. Yes, sir, he told me to show Captain Williams anything that I could show him, where the spare blocks and wire and

rope and equipment were stowed in the forepeak of the vessel, and I was there when they were rigging up some booms, they had to reeve off fairleads for the blocks so that they could run the hoisting wires under the auxiliary that was helping unload the vessel.

Q. Where was that auxiliary? A. During the daytime she hid herself somewhere in the mangroves in one of the Arms of the harbor but at nighttime she would go alongside either the port side or starboard side of the vessel.

Q. By that you mean it was another craft that had an
1475 engine on board that was being used? A. Yes, sir.

Q. And was that engine being used to operate the falls for hoisting things out of the hold of the vessel? A. Yes, sir.

Q. Did you assist Captain Williams in making those arrangements? A. Yes, sir, I did.

Q. As I understood you, you remained that night. On February 24th what did you do? A. On February 24th we returned to Darwin.

Q. Did you stay in the town of Port Darwin? A. No, sir, we returned to the camp where the crew of the *Portmar* was staying.

1476 Q. On that date did anything happen with respect to any other vessel? A. On returning to the camp that evening it was quite late and very few of the crew were there and they told us that the Senior officer of the United States Army had asked them to volunteer to help in unloading another vessel that was in the port. The men had volunteered and as a result the only men at the Army camp were the men who——

Q. What was the next date you saw the *Portmar*? A. The next date as I remember was March 2nd.

Q. In between the night of the 24th and March 2nd what were you doing? A. I was assisting in loading and unloading vessels in the port.

Q. At whose orders? A. The orders of the United States Army.

Q. Was one of those vessels a ship called the *Admiral Halstead*? A. Yes, sir.

Q. Tell us what happened on March 2nd. A. On the evening of March 2nd Captain Michelson, the chief engineer and myself went down to the *Portmar* with the salvage crowd, with the men that were going to salvage the cargo.

Q. Was Captain Williams with you? A. No, sir, he was not with us on the boat that took us down but he was down there.

Q. He was down there when you got there? A. Yes, sir.

Q. What was the condition of the vessel as you found her on that occasion? A. She was very near to the same condition only that her stern seemed to have settled more and she had a little more of a list as though the vessel's stern was sinking in the mud and we found that all of the Army equipment forward in the ship or almost all of it I should say had been removed. In addition to that a great deal of the ship's equipment had been removed—you might say everything of any value in the way of rope, paint and all this equipment, tools and ship's stores. 1478

Mr. Collins: Had been removed?

The Witness: Yes.

Q. Did you inquire as to who removed that portable property? A. Yes, I inquired of the Army officers and they told me that the Australian Navy had removed everything. 1479

Q. While the ship was lying there on the beach in the position as you found her on March 2nd what was the effect of the rise and fall of the tide on the vessel? A. As I said before, the stern of the vessel was the part that was aground, resting on the bottom, but the forward end of the ship was still afloat so that as the tide rose the bow of the ship would rise, as the tide came down the bow came down.

Q. What effect did that appear to have on the structure of the vessel? A. That appeared to have an effect of putting a severe strain on the structure of the ship.

Q. What was the extent of rise and fall of the tide in Port Darwin at that time and at that point if you observed it, do you know? A. As I remember about that time the tide, it was Spring tide, they were extreme, they had the biggest rains—I don't remember the exact footage but it was somewhere between twenty and thirty feet, nearer thirty than twenty.

Mr. Collins: This was Spring down there?

The Witness: Yes.

1481 Q. Did you remain on board the *Portmar* overnight of March 2nd-3rd? A. Yes, sir, I did.

Q. What did you do on the 3rd of March? A. The morning of the 3rd of March we returned to Darwin, were taken back to the Army camp.

Q. Was anything done on March 3rd as to inquiries made by Captain Williams as to the vessel? A. I believe it was on the evening of March 3rd the Army camp at which we were staying brought me information that Captain Williams wanted to see some of the ship's personnel with regard to the vessel.

Q. And what did you do? A. That evening the chief
1482 engineer and myself went into Port Darwin and were taken out to see Captain Williams aboard one of the Royal Australian naval vessels on which he was staying.

Q. I omitted to ask you this about the height of the tide and the effect on the *Portmar:* At high tide what was the level of water with relation to the deck of the *Portmar*? A. At high tide the poop deck of the *Portmar,* which is the highest deck on the stern of the ship, was submerged except for a very small bit on the starboard forward corner, which was the highest corner the way the ship lay, and the high water mark amidships was on the port side just the corner of the coaming of the port after shelterdeck door, so that the openings of Nos. 4 and 5 hatches on the maindeck were under water.

Q. Now will you please continue with what you did when you were told that Captain Williams wanted to see somebody about the ship? A. The chief engineer and I obtained transportation to the port and were taken out to see Captain Williams, as I said before. He was particularly interested in the extent of damage to the shell of the vessel.

Q. Where was he? A. He was on board a corvette belonging to the Royal Australian Navy which was anchored near the *Portmar*.

Q. Did you speak with him on board the corvette? A. Yes, sir, I did.

1484

Q. What particulars did he ask you for? A. He asked me if I knew the exact extent of the damage to the shell of the vessel, he told me that he was trying to plug these holes up and so far he had not succeeded and he thought that we might know of some serious damage or hole which he could not see from the surface.

Q. Did Captain Williams or anyone else ever say anything to you about salving the ship itself? A. No, sir, he only discussed the cargo.

Q. What cargo was he talking about then? A. He was talking about the guns and field pieces that were stowed in No. 4 lower hold.

Q. Were those field pieces still under water? A. Yes, sir.

1485

Q. Do we understand that this conference took place on March 3rd? A. Yes, sir, it did.

Q. Did you do anything else that night? A. I remained on board one of the small naval vessels the remainder of that night.

Q. What did you do on March 4th? A. On March 4th I returned to Darwin.

Q. Did you ever see the *Portmar* again after you left her on March 4th? A. No, sir.

Q. Did the captain stay there on the night of March 3rd-4th with you? A. No, sir, he was not there, it was just the chief engineer and myself.

Q. So that the morning of March 4th was the last time you saw the *Portmar*? A. Yes, sir.

Q. Did you form any judgment when you last saw the *Portmar* as to the possibility of raising the vessel, salving her, repairing her, re-equipping her and restoring her to the condition in which she was prior to the first bombing attack in the Timor Sea on February 15th and 16th, 1942? A. No, sir, I saw no hope at all then.

Q. I am asking you if you formed a judgment on that subject—did you form a judgment or an opinion, and if so
1487 what was your opinion? A. Yes, sir, my opinion had been formed on that day and the day previous. It appeared to me that the *Portmar* in her present situation was hopeless as far as salvage and repair and reconditioning was concerned.

Q. When you got back to the Army camp on March 4th what did you find? A. On March 4th I found that the men were still being employed as stevedores. The majority of them were getting disgruntled, grumbling about the work they were doing, they all or nearly all had the opinion that they were being held in Darwin just because they were working as stevedores for the Army and therefore valuable, but
1488 they were still working.

Q. After that did they do any more stevedoring work? A. Yes, sir.

Q. Until when? A. As I remember, they worked until the 7th. They worked on the last occasion from midnight until daylight the morning of the 7th.

Q. And what occurred then? A. Well, sometime in the afternoon of the 7th I had been trying to get a little rest during the days—I had worked that night—word was brought to me through one of the sergeants in the camp that they wanted a detail to work again that night starting at sunset. As in the past I went to the men and told them that the Army wanted a volunteer detail of fifteen men to work that night and only three of them volunteered. It so happened those three had not worked the night before so

they were still fresh. I went back and told the Army sergeant who had been asking for the volunteers that only three men volunteered. He said something to this effect: "Well, if they don't go to work tonight they better not come to the kitchen and get their supper."

Q. Did Captain Michelson take any action with regard to that situation? A. Captain Michelson heretofore left the details entirely up to me. If they asked for men I went to the men and the men had volunteered in the presence of the Senior Army officer, American Army officer there, to work in the past so I just went to the men and told 1490
them they wanted a detail and arranged which would work that night and that was all there was to it, but on this occasion after I told the sergeant that only three men volunteered to work it wasn't very long before the Adjutant of the camp, who was a captain by the way, came to our tent and asked Captain Michelson "How about it, don't I get a detail of fifteen men tonight?" and Captain Michelson said that he was not going to order them to work, if they volunteered that was entirely up to them, so then the captain told them that if they did not volunteer he would see they worked the next day under an armed guard at the point of a gun but that he would not force such a thing on the 1491
captain or his officers. Captain Michelson told him he did not expect any better treatment than his men got. With that the Army captain departed.

Q. What happened the next day? A. Well, before the next day, in fact it was but a short while before one of the lieutenants came to the tent in which the captain and myself and the chief engineer and the first assistant were sleeping and told us that we were all to be put in a restricted area under an armed guard so we all decided to leave our tent and live with the men in their tent. The camp was to be in their area. We all repaired to this one area and the Army placed sub-machine guns around the area we were in and they removed all our personal effects which might be dangerous—I remember they took my

straight razor—and they brought us our food and we were allowed to have a campfire as we had our cooks and stewards with us and they did the cooking. We did not fare so bad but we were kept in this one area, all but the three men who had volunteered the last night they asked for volunteers and two or three other men who had been doing their day's work in the camp kitchen instead of the port area on the ships.

Q. Was Captain Michelson there in that confined space with you? A. Yes, sir, he was confined with the rest of us.

1493 Q. How long did that confinement last? A. That confinement lasted until we received orders to entrain for Melbourne.

Q. When were you put on the train for Melbourne? A. As I remember it was March 10th in the afternoon.

Q. What kind of cars did you go on? A. The train consisted of open gondolas and cattle cars for the most part.

Q. Where did that train take you? A. That train took us south to the end of the line, a little stop called Birdum, I believe.

Q. How long did that run take? A. We left there on March 10th and I think it was the morning of the 12th we arrived in Birdum, very early.

1494 Q. Are we to understand the master was with you then? A. Yes, sir, he was.

Q. And all your crew except the casualties? A. Yes, sir.

Q. What happened at Birdum?

Mr. Collins: Do we have to go through all this?

Mr. Murphy: There was one thing I am coming to, yes.

Mr. Collins: It doesn't seem to me it makes much difference how they got to Melbourne. I object to it as encumbering the record.

Mr. Murphy: I am examining on things I think are material.

Mr. Collins: Well, if it is material I will withdraw my objection.

Q. Where did you go from Birdum? A. From Birdum we were taken in motor trucks, freight trucks, across the intervening space between the railroad head at Birdum and the railroad head at Alice Springs.

Q. What kind of a space is that you went through in those trucks? A. It is mostly desert space.

Q. How long a run was that? A. We got into these trucks on the afternoon of March 12th and I think we arrived at Alice Springs on the 15th of March. 1496

Q. Do you know how far that was across the desert from Birdum to Alice Springs? A. I don't remember the exact mileage.

Q. Can you give us an approximation? A. I think it was seven or eight hundred miles.

Q. At Alice Springs what did you do? A. At Alice Springs after we waited two days we were put aboard the train there and proceeded south to Melbourne.

Q. What day was it you left Alice Springs? A. I think it was on March 17th.

Q. While you were going on the railroad train from Alice Springs to Melbourne did you see anything in the way of gear which might be used to help the *Portmar*? A. Yes, sir, we did. I remember somewhere between Alice Springs and Adelaide we came into a small siding, a little town there, and as we came into this siding I noticed an open gondola car that had some big centrifugal internal engine combustion driven pumps in it. This was on a train which was bound the other way. 1497

Q. What did you do? A. While we were laying at that siding, being interested of course in pumps and salvage and so on and I knew Captain Williams was trying to raise the *Portmar*, I got out of the car we were in and went back and looked at these pumps and found that there were two of them and they both had labels on them addressing them to Captain Williams at Port Darwin.

Q. Are you able to give us the dimensions of the intake or discharge of those pumps in inches? A. No, sir, I don't think so. As I remember, one of them was quite large and I would judge to the best of my recollection perhaps a ten-inch opening. The other one was a little smaller.

Q. Did the label say where those pumps had been shipped from, what point? A. I don't remember that.

Q. Did you report to Captain Michelson what you had seen? A. Yes, sir, I immediately told Captain Michelson about it. We discussed the matter.

1499 Q. When did you arrive at Melbourne? A. We arrived at Melbourne as I remember on March 22nd, Sunday morning.

Q. Did the Captain thereafter note protest and extend the protest? A. Yes, sir, the following morning I proceeded with him to the American Consul at Melbourne where he noted protest.

Q. I show you Libellant's Exhibits 8 and 10 for identification and ask you with respect to Exhibit 8 if your signature appears at the foot of the protest, "Joseph E Bullock" under the signature of Axel Michelson? A. Yes, sir.

Q. And likewise on Exhibit 10 I ask you if your signature appears on the last page at the foot of the protest
1500 under the signature of Axel Michelson? A. Yes, sir.

Q. Were arrangements made for your transportation with your crew back to the United States? A. Yes, sir.

Q. What date did you leave Melbourne? A. I left Melbourne on April 6th.

Q. When did you arrive in San Francisco? A. I don't remember the exact date now. I think it was the 24th.

Q. April 24, 1942? A. I think so.

Q. While you were around the *Portmar* did you ever hear Captain Michelson or anyone else say that the back of the vessel was broken? A. No, sir, I did not.

Q. Did you ever say that yourself? A. No, sir.

Q. On your way back to San Francisco did you carry any of the ship's papers with you from Melbourne? A. Yes, sir, I carried the ship's articles and the official log.

Q. What did you do with the official logbook? A. I was required to deliver that to the United States Shipping Commissioner at San Francisco when we paid the crew off.

Q. Did you deliver it to the United States Shipping Commissioner at San Francisco? A. Yes, sir.

Q. Was the official logbook in Captain Michelson's handwriting? A. Yes, sir.

Q. I show you what purports to be a photostat copy of certain pages of the official logbook, offered here as Libellant's Exhibit 34 for identification. Looking at what appears to be page 10, does your signature appear there? 1502
A. Yes, sir.

Q. Under the signature of Cumber, chief engineer? A. Yes, sir.

Q. And on page 11 is your signature there under the signature of Axel Michelson? A. Yes, sir.

Q. Likewise on pages 12 and 15? A. Yes, sir.

Q. And 18? A. Yes, sir.

Q. During all the period from November 21, 1941 until your return to San Francisco April 24, 1942—by the way, what date did you arrive in New York, do you remember? A. You mean overland from San Francisco?

Q. Yes, after arrival at San Francisco. A. I don't remember the exact date. 1503

Q. Was it about a week later? A. I should say it was more—ten days or two weeks.

Q. At any rate, for the entire period from November 21, 1941 until you arrived in New York who paid your salary? A. The Calmar Steamship Corporation.

Cross examination by Mr. Mount:

Q. Captain Bullock, there are just a few details I would like to clear up. In the protest which you signed I think you stated that there was no leaking of the *Portmar* from the bombing in Timor Sea on February 16th, is that correct? A. The soundings showed none.

Q. Do I understand that you found two fires in No. 4 hold and one in No. 5? A. No.

Q. What were the facts? A. As I remember, all the fire was in No. 4 hold, that is the one just abaft—however, the 4 and 5 holds are one hold in that ship. In other words, the bulkhead is pierced.

Q. But there were two instances of fire in No. 4 hold? A. There were two instances in which I went down in the hold and put fire out, yes.

Q. And I understand your testimony to be that those were gotten under control in fairly short time? A. Yes.

Q. Have you any recollection how long it took to get
1505 them under control? A. I didn't look at any watches so I have no recollection, but I do know that in both instances the fires were inside of what they call an ammunition trailer and these trailers had been loaded with ten-inch and all kinds of combustible Army equipment and then they had been covered with canvas covers with the rack stuck in, so we had to rip off those canvas covers to get down to whatever was burning in the trailers and then either put water or use a chemical extinguisher on the area that was burning. It was a smoldering fire, it wasn't a flame that you could see.

Q. Was there more than one trailer involved? A. Yes, there was.

1506 Q. Several trailers involved? A. Yes, sir.

Q. The last time you saw the *Portmar*, which was March 4th, I think, her list had improved, that is she had straightened up to about ten degrees, is that right? A. Her list was not what it was on the day that we first left her.

Q. I would like to ask you a couple of questions about Wyndham. To reach the dock where you discharged gasoline at Wyndham you had to go up some kind of an estuary or river? A. Yes.

Q. How long was that, approximately? A. Well, I have no recollection of the exact mileage but there were no lights and very few marks of any kind at all, man-made marks. The man that took us had only been in there a few times himself so that we did not travel at nighttime. If there was any threat of rainsqualls obscuring the land he would not travel either and we had to anchor, so it took us quite some time, I cannot recall how long.

Q. Would you have any idea of approximate distance? I don't mean to hold you down to it but just your idea—was it five miles or ten miles? A. I might have some record in the logbook and be positive.

Q. Will you look in your log? A. I will take a look in the log. (Referring to log) No, there is no record in the logbook.

Q. Does the logbook show the time from the entrance—A. I am just looking for that. According to the logbook we weighed anchor at the place we were anchored inside Cross Island at 6.08 in the morning. 1508

Mr. Murphy: Is Cross Island off Wyndham at the head of the estuary?

The Witness: That is at the head of the gulf.

Mr. Murphy: At the mouth?

The Witness: Yes.

A. (Continuing) And we anchored the ship again at 6.45 because of a heavy rainsquall and we weighed anchor again at 9.28 and arrived off the dock at 11.46.

Q. 11.46? A. Yes.

Q. What was there at Wyndham that you could see, what kind of a port was it, if any? A. Wyndham was a 1509 meat-packing station with a big refrigeration plant and a small machine shop, small village, an airfield, and the dock adjacent to the meat-packing plant.

Q. So that you docked at the meat-packing plant's dock? A. Yes, that is all there was there to dock at.

Q. And was the airfield if you know an Australian airfield or a United States Army airfield? A. I don't know what it was.

Q. Do you know whether there were any United States Army soldiers there? A. We did not see any.

Q. And you did not see any Americans at Wyndham? A. No.

Q. Now, on the trip from Port Darwin for Koepang starting February 15th you spoke of some Australian cargo, tents and so forth? A. That's right.

Q. Did you have a manifest of the cargo on that trip? A. I don't recall having a manifest but when we first docked at Darwin to load this cargo they brought me as the chief mate of the vessel in charge of the stowing of it a list of everything that was to come in the ship and I was to arrange my stowage so that I would have room to quarter the soldiers in the tweendecks and carry all of the cargo.

Q. I don't suppose you have that list now? A. No.

Q. Will you tell us from your best recollection just what Australian cargo there was on the *Portmar* on that trip?

1511 A. As I remember it the Australian cargo consisted of rolls of barbed wire, iron barbed wire for making entanglements presumably, and bundles of iron sticks of some kind to be used with them and there was a sling load or two at the most, as I remember, of tents belonging to the Australians. Besides this motorboat, the *Nevbet*—I didn't know at the time that belonged to the Australians but later on when we were using that boat in the harbor after the *Portmar* had been stranded on the beach they told me it belonged to them and we had to get permission from them to use it.

Q. That sums up the Australian cargo, does it? A. That's all.

1512 Q. Were there any Australian personnel on board on that trip? A. No, sir.

Q. In answer to one of Mr. Murphy's questions you said that you did not say anything to anybody about the ship's back being broken. Did you think the ship's back was broken? A. No, sir, I did not think the ship's back was broken.

Q. Now, the holes in the skin of the ship which you saw were in holds 4 and 5. I am not sure whether you saw any holes in the skin of the ship opposite the engineroom or in the engineroom space? A. Yes, I did although I wasn't in the engineroom. As soon as we began to try to plug these holes I put two men on a raft over the side of the ship and while helping to get them started I was down on this raft with them. From there I could see the engineroom—they started up forward, the forward end of the ship—I could see the holes in the skin of the ship in the way of the engineroom.

Q. Were there many in the way of the engineroom? A. Well, I don't remember noticing particularly whether there were more or less there than anywhere else. I just remember this sieve, as it were, over that whole area.

Q. But not forward of the engineroom? A. From the outside of the ship you couldn't tell definitely whether they were in the engineroom or not but as I remember it extended just about to the middle of the ship what we could see.

Q. Did you have any oil in the deep tanks when the *Portmar* was bombed on February 19th? A. I don't recall offhand whether we did or not. That would not be my department, that would be the engineroom's department. 1514

Q. You spoke of the civilians at Port Darwin having been evacuated. You were there in Port Darwin from January 19th on to February 15th excepting for the trip to Wyndham—that is you arrived at Port Darwin first on January 19th? You can look at your log if you want to check that. A. Yes, we were at Port Darwin.

Q. My question is this: Do you know whether the civilians were evacuated prior to the bombing of February 19th? A. Do I know?

Q. Yes. In other words, did you see civilians in Port Darwin prior to the time you started for Koepang? A. Oh yes, I had my hair cut around the shopping district and 1515 started to go to a movie one night but it rained.

Q. So that the evacuation of the civilians at Port Darwin was because of this bombing that you went through? A. I don't know that but that is what I judged.

Q. That was the time of the evacuation, was it? A. I wouldn't know the exact time.

Q. There were civilians in Port Darwin prior to that? A. Yes, there were.

Q. You said that you had come to the opinion that salvage of the *Portmar* was hopeless. Will you tell us your process of reasoning, that is on what did you base that opinion, what were the factors that led you to that conclusion? A. Well, in the first place the situation at Darwin was such that everyone from one minute to the next expected

to be told that the Japs had landed on one of the beaches there. During the daytime there was no activity at all, all activity was at night, so to get anybody to go to work even to do anything you would have had to have them under military discipline. I know that I had seen what had happened when the port was attacked—the civilian stevedores that were there just disappeared you might say, they wouldn't go near the port, and we people who were acquainted with ships had been asked by our own Army to volunteer and we were the only people that would work. I
1517 remember when they started salvage operations on the *Portmar* there were some of the crews of these other Australian ships that had been bombed and sunk, they were there, and even they would not go near the *Portmar* to assist in the operations. The only people they could get to go down there were men in the armed forces who were told by their superior officers if they did not do it they were subject to whatever military rule the armed forces had on them. That was the first thing, and the next was there were no facilities in Darwin at all that did not belong to some military authority. What they did have there was such that very little could be done. There was one small railroad roundhouse there that took care of a narrow gauge
1518 railroad stop of the railroad that ran to Birdum and that's all. The *Portmar* previous to this had had some small repairs she wanted made to one of her auxiliary pumps and she could not get it done there, there was no facilities at all in Darwin for repairing this small pump, so I knew from that that there were no facilities in the way of machinery in Darwin. Between the danger from the enemy which naturally affected everybody's attitude and the lack of any facilities there I was of the wholehearted opinion that nothing could be done.

Q. There was nothing in the physical condition of the *Portmar* herself that prevented her salvage? A. Well, as far as I was able to see the *Portmar* was in such condition that it would have been, even if you did have the facilities in Port Darwin, say, that you had in Mare Island Navy

yard or some similar big repair yard with all they had, what little bit I know about it of the cost of shipyard repairs and cleaning of ships and such as that the cost would have been prohibitive. As to it being physically possible, yes, if you were able to have everything at your command you could have pushed the Japanese back to Yokohama perhaps, brought in everything you wanted, brought ships up the Torres Strait or up Fremantle, it would have been possible physically.

Q. Well, I take it that the situation with respect to the Japanese and the lack of facilities at Port Darwin are the two big factors that led you to your conclusion? A. Well, it led me to the conclusion practically, yes, as you said. Physically, if you had everything at your command, yes, it could have been done. 1520

Cross examination by Mr. Collins:

Q. Did you go with Captain Michelson on his visits to the American Consulates at any of these ports in Australia? A. I was with Captain Michelson when he first went to the American Consul in Melbourne.

Q. That was after? A. That was after we had arrived in South Australia.

Q. Well, I mean just after you arrived at Sydney and proceeded to the various other Australian ports, did you go with him to any of the consulates? A. No, I wouldn't do that. 1521

Q. You spoke of these cargo security officers who were non-commissioned officers in the American Army who were on board. Do you remember who they were? A. You mean their names?

Q. Yes. A. Offhand I cannot remember their names, no.

Q. How long did they remain with the ship? A. My recollection is they remained with the ship until she was brought to the dock in Darwin to discharge her cargo.

Q. They left after the cargo was discharged? A. No, sometime between the time she docked and the time we left Darwin for Wyndham they were removed from the vessel.

Q. Did you hear at any time while you were at Port Darwin after the bombing anything about the qualifications of Captain Williams as an expert on salvage? A. You mean at Darwin after the bombing?

Q. Yes. A. Yes, I think I heard talk of him being a salvage expert.

Q. About when was that? A. Well, that I don't remember.

Q. Did Colonel Petterson tell you anything about it? A. No, I don't believe he did.

1523 Q. Now, according to my notes you made two or three trips to and from the *Portmar* while you were in Port Darwin and Captain Williams was with you and Captain Michelson on some of those trips, is that correct? A. Yes.

Q. And on some of those trips the salvage of the Army cargo had already commenced? A. That is correct.

Q. You heard no conversation between Captain Michelson and Captain Williams at any of those times as to the possibility of salvaging the vessel as well as the cargo? A. No, I did not.

Q. In other words, at no time when you were present with Captain Michelson and Captain Williams was any mention made at all of the question of whether the ship
1524 herself could be salvaged? A. I don't recall any.

Q. How long did it take to go on this launch from the *Portmar* back to the dock at Port Darwin? A. Which launch is that?

Q. Well, I recall you went on two. How long did it take on the *Nevbet*? A. Well, I don't recall the exact time, we never timed it, but with the *Nevbet* it depended a good deal on the tide. She did not have very good power and if the tide were against you it might take two hours. If it were with you it might take an hour less.

Q. The other vessel you traveled on was what? A. On one occasion we went down on a small motor runabout or launch that I think belonged to some air line chap. They formerly had a base there. Another time we went down on a small freight craft, motor scow.

Q. I take it Colonel Petterson was in charge of the attempt to get out the equipment for his own regiment? A. The only occasion on which I saw Colonel Petterson there was the time he made the first trip down with Captain Williams and allowed me to go with him—that is the only time I know of him being there. The rest of the time I was there Captain Williams and one of his men were there supervising the actual unloading of the equipment from the *Portmar*.

Q. You spent two or more nights on the *Portmar* while Captain Williams was there engaged in that work? A. Yes. 1526

Q. And on none of those occasions did you discuss with him the question of salvaging the vessel? A. No, sir.

Q. You had heard at that time that he was something of a salvage expert? A. I don't recall just when it was I heard of his prowess as a salvage expert. It was sometime while we were in Australia.

Q. It was sometime while you were at Port Darwin, wasn't it? A. I am not positive but I think I heard something while we were there.

Q. Did you and Captain Michelson discuss between yourselves whether the ship could be salvaged? A. Well, as to the actual discussion as to whether it could be salvaged or not, whether we went into that I am not certain. I do know that we officers while we were living in that tent discussed a good many things. 1527

Q. Did you and Captain Michelson discuss whether she could be re-floated? A. Yes, I think we did that.

Q. What conclusion did you come to, if any? A. I don't know that we came to any conclusion. I do know that we were both—

Q. Weren't you—

Mr. Murphy: Have you finished?

Q. Excuse me, go ahead. A. Well, he asked me if we discussed——

Q. Go ahead. A. I do know that we were both aware of the lack of facilities in that port to float it.

Q. Wasn't it your opinion that it was no great feat to re-float the vessel? A. As I said to Mr. Mount, given the proper facilities which were not in Darwin it would have been a very simple matter as I saw it.

Q. Well, I refer you to the statement made in a letter from Captain Michelson to Mr. Warley, President of Calmar Steamship Corporation, Libellant's Exhibit 21 for identification, dated Melbourne April 17, 1942: "The ship was re-floated only for the reason that half the field guns and equipment of an American regiment of field artillery
1529 was in our 4 and 5 holds and the chief mate and chief engineer will when they arrive tell you that to re-float the ship was no great feat in itself". Does that refresh your recollection as to whether it was your opinion that the ship could be re-floated without great difficulty? A. I repeat the statement that I made just previous to this, that given the facilities which were not in Darwin and which we had no means of our own of obtaining—we could see no civil authority there that could obtain them for us—given these facilities, yes, it would have been a very easy matter.

Q. But actually neither you nor Captain Michelson made any attempt after the bombing to find those facilities? A. I don't know what Captain Michelson did in detail.

1530 Q. But you did not? A. I, no, it was not my business to, I was still taking orders from Captain Michelson.

Q. You spoke of the equipment aboard the ship being removed by the Australian Navy. Were you there when it was removed or when any of it was removed? A. I don't recall seeing any of the ship's equipment physically removed from the vessel. I do know that I saw a good deal of it on their lighters. I did see that a lot of it was removed from the vessel on subsequent visits. I knew what we had in the way of spare equipment.

Q. I mean you did not see it being removed? A. No, I did not see the physical act of the passing.

Q. You don't know whether they requisitioned it or what? A. No, I wouldn't know that.

Q. Did you see any looting of the ship? A. Well, on one of the occasions when we returned to the vessel, I don't

recall just which it was, it must have been one of the first ones, we returned to the vessel and as we came alongside there was a small dinghy belonging to one of the Australian vessels anchored nearby and this dinghy was piled high with our belongings, mostly new shoes and new clothing that had been rifled—I say rifled—from the barracks bags and duffel bags of the soldiers aboard the vessel. When we arrived they—these things were all piled up in duffel bags that belonged to the soldiers, and when we arrived they told us there was some food off the ship they were saving and we were not satisfied and we opened the bags up and 1532
that is what we found, these things belonging to the soldiers and possibly some of the crew in these bags and we made them return them to the vessel.

Q. Had you ever been in Port Darwin before this voyage? A. No, sir.

Q. When you were approaching this place where the vessel finally was beached you were groping your way along, I presume—that is, you were using lead? A. We were using a lead line and trying to judge distances from various peaks and landmarks that were above water.

Q. And your object was to put the vessel aground somewhere in that area? A. That's right. 1533

Q. You could not be sure just where she would take the ground? A. Well, we had no physical way of determining right to the yard where the ship was.

Q. Nor the exact depth as you moved along? A. We could get the depth of the water with the lead line.

Q. You did bring up approximately near the spot you were aiming for? A. In the vicinity, yes.

Q. How old are you, Captain? A. Thirty-one.

Q. Were you in other bombing raids subsequent to this? A. Subsequent?

Q. Yes. A. No.

Re-direct examination by Mr. Murphy:

Q. Captain, I omitted to ask you whether or not when you looked in the holds of the vessel before the last occasion

1534 when you left the vessel did you make any observation as to the condition of the holds and engineroom with respect to oil and mud and water? A. Yes, sir, you couldn't escape this oil. It was, as I say, coated very thickly on everything—below the high tide line just everything was covered with a thick scum where this fuel oil had escaped from the ship's tanks.

Q. Was there any mud in the engineroom? A. I couldn't see any because it was full of water and oil and oil on top of the water.

1535 Q. That was all below the water and the oil on top of the water? A. Yes.

Q. Were you able to get access to the shaft alley back of the engineroom? A. No, sir, that was all under water.

Mr. Murphy: I would like to call on Government counsel to particularize the statement he made as being the nature of the Government's answer to the libel in this case. According to my notes Mr. Collins stated at the opening of the depositions that a defense on the part of the Government and the individuals whom he represents will be on the ground that the Court has no jurisdiction of the subject

1536 matter of this suit because the *Portmar* was a public vessel. I will ask Mr. Collins to state on what date it is contended by him that the *Portmar* became a public vessel.

Mr. Collins: We reserve the right to contend that the vessel was a public vessel because of the cargo which she carried from the outset of the voyage.

Mr. Murphy: Then your contention that she was a public vessel is based on the nature of the cargo which she carried out of San Francisco?

Mr. Collins: I expect to file an answer in the near future and I prefer not to make any further statement.

Excerpts from the Testimony of Captain Axel Michelson.

1537

Libelant's Exhibit 51.

IN THE

UNITED STATES COURT OF CLAIMS.

CALMAR STEAMSHIP CORPORATION,
Plaintiff,
against
UNITED STATES OF AMERICA,
Defendant.

No. 48509

1538

New York, New York,
December 5, 1950.

TESTIMONY FOR PLAINTIFF.

AXEL MICHELSON, a witness produced by the plaintiff, 1539
having first been duly sworn by the Commissioner was examined, and, in answer to interrogatories, testified as follows:

Direct examination by Mr. Murphy:

37Q. What was her speed under good weather conditions on a fuel-oil consumption of 164 barrels per day of 24 hours? A. 10 knots.

Cross examination by Mr. Smith:

1267XQ. Captain, you sailed a good many ships during the war period, I am told; is that true? A. Yes, sir, I had several.

1540 *Excerpts from the Testimony of Captain Axel Michelson.*

1268XQ. Have you sailed under routing instructions a number of times during the war? A. Which?

1269XQ. Naval routing instructions. A. Yes, sir.

1270XQ. Have you sailed in convoy? A. Yes.

1271XQ. Have you attended convoy conferences during the war time? A. Yes, sir.

1272XQ. Now, were the instructions that you received in San Francisco for the original voyage very much different in kind or quality from your usual kind of routing instructions you got during the war period? A. No, sir.

1541 1273XQ. And you got them from the Navy, just as you got all routing instructions during the war period; is that correct? A. Yes, sir.

1274XQ. Now, just to skip about a little bit while we are on this point: did the conference that you attended prior to departure from Darwin bound for Timor differ in any great respect from convoy conferences you attended on other occasions? A. Well, only in this way: that it seemed that authority was divided in Darwin. There was the American naval authorities, and Captain Rooks the commanding officer; and I received my orders from Lieutenant Gollar, that was of the Australian Navy.

1542 1275XQ. But otherwise it was the same as other convoy conferences which you customarily attended before sailing in convoy throughout the war period? A. Well, it differed a little in this way: that most of the conferences I have been through there were mostly merchantmen and there would be a naval officer there that would give us our instructions; but, in Darwin, there was at least as many naval officers —I might say there was more than twice as many naval officers as merchantmen. We were just four merchant marine captains to that conference.

1276XQ. But the procedure of getting together all the masters that are to form the convoy and giving them oral instructions about what to do in case the convoy is attacked and the other matters you testified to was essentially

similar to what goes on in every convoy conference, wasn't it? A. Yes, sir.

* * * * * * *

1309XQ. Captain Michelson, I understand that you have kept a record of your own of the points through which you were directed to pass in the routing instructions given you by the U. S. Navy before leaving San Francisco. Would you agree to check that record and write me a letter setting forth the points through which you were routed, so that I may send the original of the letter to the Commissioner and a copy of the letter to Mr. Murphy; and that that letter may 1544 be deemed your answer to my question about your routing instructions? A. Yes, sir.

Mr. Murphy: Will you also agree, Mr. Smith, that, if there is anything I have doubts about, I can write him a letter and ask him a question, and that that question and his answer go in in place of redirect-examination?

Mr. Smith: That is agreeable.

(Discussion off the record followed.)

By Mr. Smith: 1545

1310XQ. Now, Captain, can you state again the date when you received a message from the Navy Department to put into the Fijis? A. That was the 11th of December, as near as I remember.

1311XQ. And at that time were you on the route that was assigned to you by the Navy? A. No, sir.

1312XQ. Had you departed from it? A. Yes, sir.

1313XQ. Will you state the circumstances causing you to have departed from that route prior to the receipt of the message from the Navy Department. A. When I heard over the radio—we heard over the radio for days afterwards what was happening; when I heard that I went down and took a look at my orders and I saw that that course was

to take me between the two islands which I was trying to remember—I believe Fanning and Christmas; and I knew then that there were cable landings on both of those islands, and I knew the distance between the two islands—I couldn't pass through night or day without being observed. So I said to myself this is where I am going to depart from my Navy orders, because those two cable stations, that would very likely be the two first points down there the Japanese would try to get hold of and catch me down there in a trap right away. So from there on I steered a course south,
1547 because I said to myself that sometime before very long the Navy will do something about the ships they have got here in the Southwest Pacific and they will send orders to us, whereas, if I go between the islands, the Japanese very likely will pick me up, and there will be no ship to give orders to. So I steered a course just about which would keep me to the east of all the islands.

1314XQ. Now, about what time did you alter your course to depart from the Navy routing? A. That was as soon after as I was certain that this was the real thing we were hearing over the radio and not a hoax; and I started to worry about the ship then.

1315XQ. Could you give us some idea of the time of day
1548 that was? A. I would say within an hour when we first heard about it.

1316XQ. When was that, that you first heard about it? A. That was shortly after breakfast, November 7th.

1317XQ. December 7th? A. December 7th; I beg your pardon.

1318XQ. Could you, on this chart, Defendant's Exhibit 1, give us—an approximation, always, from memory and the best of your judgment—your approximate position at the time you made that alteration? A. No, sir, I could not; but I believe I could give you that from some old datas I have got home I could give that to you.

1319XQ. Will you include in the letter you are going to write to me another paragraph which will state whatever

your record indicates was your approximate position at the time you departed from the routing? A. Yes, sir, I will; but, if I shouldn't find it, I can't do it—I would have to guess again.

1320XQ. Give us any information you can. A. This point I should have passed through——

Mr. Murphy, Mr. Smith: Witness is pointing to "1".

(Answer continued): I was roughly there when I heard about Pearl Harbor. (Witness indicates on chart, Defend- 1550
ant's Exhibit 1.)

1321XQ. Would you mark a circle at that point you mention and letter it "A". A. (Witness marks chart accordingly.) This is a small-scale chart.

1322XQ. We all understand it is very approximate. And could you give us some sort of general approximation of your position at the time you received the Navy message? A. All very rough—B. (Witness marks the chart with a B.)

1323XQ. And would you state approximately how far south of your original route point "B" was—just approximate again. I will give you dividers, if it will help. A. (Witness measures.) Well, that's 10 degrees; that's 600 1551
miles. So that would be about 600 miles right there.

1324XQ. Will you state about how far south of your route Suva in the Fijis is? A. I'd say well over three hundred miles.

1325XQ. Something over three hundred miles? A. Yes.

1326XQ. When you got to Suva, what sort of orders did you receive from the British commander; were they routing instructions? A. Yes, sir.

1327XQ. Were they very much different, in type or kind, from the routing instructions you had received from San Francisco? A. No.

1328XQ. Did the American commander say anything about changing the destination from the Philippines to Port Darwin which would indicate that he knew about that

change in destination plan to you? A. There was no talk what would happen to the ship after I got to Sydney; but those two Commanders Gray were pretty decent men, both of them—they were sailormen, and you could feel that. I said to this British Commander Gray, "This is an American officer"—meaning this other Commander Gray—"Do you mind if I talk to him private?" "By all means, Captain," he said. "Take Commander Gray with you and ask him any questions you want to." Because I had been unable to get in touch with the American Consul there,
1553 and I wanted to get, as near as possible, an American officer or official's authorization on the step I was taking to obey the British orders. And he told me, he says: "Captain, it's absolutely all right. It's all with my knowledge and consent that you take those orders, and I wish you would do your very best to follow them up."

1329XQ. Now, the orders that you received were the route to follow to go to Australia? A. Yes, sir.

1330XQ. They had nothing to do with staying in Australia once you got there,—merely the route you were to take; is that it? A. They weren't mentioning what would happen to me when I got to Australia at all.

1554 1331XQ. They said nothing about discharging the cargo in Australia? A. No, sir. They told me to go outside Sydney quite a little distance—mentioned latitude and longitude; and they told me I would be met by a unit of the Australian Navy there and carried into port.

1332XQ. Into Sydney? A. Yes, sir.

1333XQ. Now, Captain, about how far south of your original route was this point off Sydney to which you were routed? A. Oh, that was about a thousand miles.

1334XQ. About a thousand miles? A. Yes, sir.

1335XQ. Did you arrive at the point off Sydney to which you were routed by the British Commander Gray? A. Yes, sir.

1336XQ. And what was the date when you arrived at that point? A. That was one of the last days in December.

1337XQ. Now, at that time, did you have any information at all about what the war situation was, over the radio or otherwise, north of where you were? A. Only in a general way.

1338XQ. Well, what general information did you have at that time? A. That the war situation was very bad—that is, seen with American eyes.

1339XQ. Did you have any information as to the Japanese operations in the Arafura Sea or the Coral Sea or any of the seas north of you? A. Yes, sir; we heard over the radio. Of course, I was no judge of how good the information was that we got over the radio. Part of the time it might only have been rumors, and I didn't believe nearly all we heard. In a general way, we knew that the Japanese were very much masters of the ocean route to the Philippines and towards Australia. 1556

1340XQ. Now, did you meet an Australian naval vessel at the point indicated by Commander Gray? A. No, sir, we did not; and I had been given oral orders that we were to wait outside until we were met by an Australian unit, and I was told, "Don't go in, Captain; they will shoot you down on the spot."

1341XQ. Well, what did you do? A. Well, I waited overnight. They have a lot of grass fires in Australia and bush fires, and it was so smoky out there that it was very difficult to get exact observations, because we had no horizon to measure from, and I remember the Mate and I were constantly taking observations so as to be in the exact point. 1557

While we were lying there—we got in about noon to the point—while we were lying there in the afternoon waiting for this Australian ship to meet us, two big ships—British ships I took them to be—they showed no colors, any of them—they saw us; and both of them, as soon as they saw us, they piped to quarters, because they thought that I was a German ship. There had been several German raiders in that part of the world, and they had gotten away with lots of British ships; and those ships they kept a considerable

distance from me, but I could see they had all their men standing at quarters. One of them, after waiting a while, she pulled out to sea again. The other one, she hung around until about dusk—that is, at a considerable distance; and I noticed that she turned away from me, so I didn't have much of a target if I had guns that could hit her. She kept turning away from me until evening; that is, she stayed in the same position, but she would make a swing against the tide and straighten out and just have her stern guns pointed at us. When it got dark, or just before that, she made a
1559 dash for the land about three miles to the north of us. She made for the land and disappeared.

1342XQ. What happened after that? A. We laid there all night, waiting for this Australian ship that never came. I had been told not to move from there because the waters they were mined from there to Sydney. We laid there all night, and, when morning came, early morning, just about sunrise—it was not clear but fairly clear, and I got stellar observations—good ones; so I corrected my position, and we stood in about a mile or two, because we were that far from the assigned position.

I told the Mate to check my positions, and he got essen-
1560 tially the same thing, within half a minute or so; and he said, "Captain, if we are going to lay out here any length of time, somebody is going to come along and shoot us down." I said, "I realize that." He said, "I suppose the Australians don't know about the orders you have been getting in Suva."

By that time, we didn't trust anybody, no matter who they were. Well, I said it would hardly be a fake,—that they had taken over Suva and could just fool us to that extent,—that they could give us fake orders.

So we waited until it was well daylight, and I says to the Mate, "I am going to Sydney." He said, "Captain, are you going to run us through the mine field?" I said, "Mr. Mate, this is a mine field; there are just four positions the British mark out on the chart, and they say that

field is mined; but, for all what I know, there may be four mines in the corner of it. I am going to take a chance, because we are taking no more chance steaming up through that field than we are laying up here."

So, shortly after that, we checked our position once more, and I steamed for Sydney.

1343XQ. And did your get through all right? A. Well, we didn't get very far up along the coast before the whole Australian Navy came up to meet us, and they were all standing by with everything they had. I had great big letters on my side that said "U S A", bigger than your 1562
windows, that you could see for miles. But the British, of course, didn't believe anything either; it could easily have been camouflaged. A cruiser run up each side and a corvette ahead and astern of me, so I was completely ringed in. Then they sent two launches with an armed crew alongside of me, and I was pretty sarcastic about that time. I said to the lieutenant in the launch: "What are you scared of; why don't you come aboard?" He looked up and said, "I will"; and he came aboard.

He said, "Captain, who are you and where do you come from?" I said I am the captain of the ship and told him what my name was and I said, "This is an American ship"; 1563
and I gave him a short résumé of what happened to me.

I said, "We were here last night. We were told to come to so-and-so position and we would be met by one of your ships that would escort us into port; but there was none there." I told him we waited, but it was kind of hot—dangerous to lay up there. He said, "It is dangerous to walk through a mine field." And I said, "What about your commanding officer taking all those cruisers through the mine field?" He kind of smiled sourly at that. He didn't trust me yet. So I took him up and showed him my papers.

He said, "Captain, there has been a mistake on somebody's part. I believe you are all right." So he signaled back to his commanding officer, and I was told to follow a certain ship of the Australian Navy up to Sydney entrance, which I did.

1564 *Excerpts from the Testimony of Captain Axel Michelson.*

When we came up to Sydney entrance, there was a pilot boat laying there, and I was told to stop and take the pilot aboard. There was a pilot came aboard and took the ship into port, but the Australian cruiser stayed with us,—I believe it was a torpedo destroyer; she stayed with us until we anchored in Sydney Harbor.

1344XQ. Now, after you anchored, did you go ashore? A. Yes, sir.

1345XQ. Did you get in touch with any American authorities? A. Yes, sir.

1565 1346XQ. Up to that time, had anybody given you orders to discharge cargo at any point other than your place of destination? A. Never heard a word about the cargo.

1347XQ. And you were about a thousand miles south of your route? A. Roughly.

1348XQ. But you were still following, generally, the course you were routed, but about a thousand miles south of it? A. Well, that can't hardly be called roughly, because that's worse than roughly.

1349XQ. Now, when you got ashore in Australia, did you learn anything further about the war situation? A. I did.

1350XQ. You did? A. Yes, sir, I did.

1566 1351XQ. Did you learn anything about the war operations in the seas north of Australia? A. Yes, in a general way, I heard that the Japanese they were pretty well in control of the situation north of Australia.

1352XQ. Did you consider that it would be advisable for you to proceed to the Philippines at that time? A. Mr. Smith, I didn't worry about it, because I knew that would be decided by people that knew more about it and had more authority than I did.

1353XQ. Now, when you saw the American officials in Sydney, was anything said about your cargo? A. Not right away. I was taken into port. The doctor came aboard and looked us over. The Australians they inspected the ship from fore to aft. They asked for my manifest, and I gave them this here manifest that stated I had a certain number

of pieces of supplies and war material to go to Manila. And they asked me, they said: "Is that all the manifest you have got?" And I said yes. I didn't know at that time that the eldest of the staff-sergeants he had this here manifest. We were later on the dock—at the dock in Sydney—one of Dalgety's wharves; and we were allowed to go ashore—the Staff-Sergeant, also, of course. And I think the Staff-Sergeant he went and reported to some American officer in Sydney and probably showed him the manifests.

I went up and got Dalgety as an agent. That was the 1568
first time I had ever met or seen anything of the Dalgety's; and, of course, they didn't know anything about what was going to happen to me. They helped me get around town and take care of my custom formalities; and one of Dalgety's men went up with me when I went to the American Consul General.

1354XQ. Did the Consul General say anything to you about the disposition of your cargo? A. No, sir, he did not. As far as the Consul General goes, they just took me into his inside office and introduced me to him, and I said a couple of words, and he said a couple of words; and he told me, in a general way, his men—the vice-consuls 1569
—would take care of me. And that was the only time I saw the American Consul General.

1355XQ. And when was the first time any official of any kind spoke to you about your cargo? A. I believe that it was when I got aboard the ship in the afternoon that the Chief Mate he told me that there was an American vice-consul and an American military attache aboard ship, and he said, "Captain, they are looking around on the hatches. Will I bring them up here?" I says, "By all means, do." They came up to my quarters then. I invited them in and they sat down and spoke for a moment. You didn't like to say anything on either side, because everybody was afraid of everybody else. Then the eldest staff-sergeant he came up and asked for permission to come in, and he

reported to this here military attache, and he told him—I forget what his rank was,—lieutenant-colonel—or maybe only major. He says, "Major, I carry a complete manifest of the cargo aboard ship." And that was the first time I knew anything about there being a complete manifest of the cargo.

1356XQ. And what did the major say, if anything? A. I don't remember. It seems to me that he told the staff-sergeant that later on in the day there would an American officer come aboard ship and pick up the manifest and get in touch with the Mate and find out how the disposition of
1571 that cargo was in the ship's hold.

1357XQ. Did you have a loading plan? A. No.

1358XQ. Isn't it unusual not to have a loading plan? A. Yes, it is. I always carry a loading plan when I sail for Calmar.

1359XQ. Did you receive orders not to prepare one when you sailed from San Francisco? A. We had nothing to do with it, and the army loaded the ship. They were in such a hurry to send the things into the ship that the major came time and again and said, "Captain, this cargo is just being thrown into the ship." And the Mate remonstrated with him, and said he had never seen any cargo
1572 thrown in any ship that way. They told the Mate it was no business of his, but the Mate kept on making his observations of the loading, and he knew in a general way how the cargo was stowed from fore to aft.

1360XQ. He didn't make out a plan for his own information or help? A. No, he did not. There was no time or chance to do it. We were so busy getting stores and picking up supplies that the Mate had more than he could hardly handle.

1361XQ. Now, after the major was told that the staff-sergeant had a complete manifest and had indicated he would get in touch with the Mate about the position of the cargo and so on, did you have any further conversations or transactions with any American or any authorities of any

sort about the cargo? A. I was in touch with the Consul every day as long as I was in Sydney and, of course, I was in touch with my agents, and they told me the way it looked I was going to be sent to a port further north and my cargo would be taken out and restowed or partly taken out and——

1362XQ. Restowed? A. Restowed, yes.

1363XQ. Was that subsequently confirmed by any order or direction? A. Yes, sir, it was.

1364XQ. And when did you receive the first positive direction about your cargo? A. That was the first positive 1574
knowledge I had of what was going to happen to the cargo that I received after I got to Brisbane.

1365XQ. Now, did you receive further orders to go to Brisbane after you arrived at Sydney? A. Yes, sir.

1366XQ. From whom did you receive those orders? A. I received that from the Australian Naval Control.

1367XQ. Was that a routing order? A. That was a routing order, yes, sir.

1368XQ. Now, when you got to Brisbane, did you receive any further orders concerning your cargo? A. Yes, sir. When I got to Brisbane, I arrived late in the evening, and I anchored off the town until the next morning. The 1575
next morning, they docked me—put me alongside of a wharf, and there was several American officers on the wharf that came aboard and came up in my quarters. They told me that part of my cargo was to be taken out of the ship, and it was going to be checked and restowed or maybe exchanged for some of the cargo that was already on the wharf. All the wharves around there was loaded with cargo or American military supplies and equipment just like I had. It seemed to me it was thrown ashore in practically any order, because there was a lot of confusion there. They had the manifests of the cargo, or copies of it, and they went over the ship, and the holds were opened up——

1576 *Excerpts from the Testimony of Captain Axel Michelson.*

1369XQ. Did they direct that that be done? A. Yes, sir.

1370XQ. Now, was that the first order you had received concerning the handling of your ship that was not a routing order? A. Yes, sir.

1371XQ. That was the first non-routing order you got from any authority when they ordered that the holds be opened up in Brisbane? A. Yes.

1372XQ. What date was that? A. Just you had heard rumors a little about Sydney.

1373XQ. No; the order that was not a routing order.

1577 A. That was the first order I got.

1374XQ. Can you tell me approximately the date of that? A. It seems now when I think back we arrived on the 5th of January so this must have been the 6th.

1375XQ. The 6th of January? A. As near as I remember.

1376XQ. That is, 1942, the 6th of January, 1942? A. That's right.

1377XQ. Now, did you have any information at that time as to the state of the war up north, in addition to what you had when you first arrived in Sydney? A. Yes, sir; I knew it was not getting any better.

1578 1378XQ. Had the Japanese ever put in an appearance in those waters; do you know or had you heard? A. Well, of real, exact information there was none around. It was all rumors and hearsay and what you would hear on the radio and get an idea of from the headlines of the papers. How good it was, I didn't know.

1379XQ. But you knew the war wasn't going well in the waters north? A. I did.

1380XQ. I think you previously testified that your cargo was partly unloaded and sorted and restowed? A. Yes, sir.

1381XQ. Did you get any sort of receipt or document from the army authorities, acknowledging receipt of your cargo, or any document concerning your cargo, that you recall? A. I don't remember I did.

1382XQ. Now, I believe you testified previously that you received orders at Brisbane to proceed to Port Darwin? A. That's right.

1383XQ. And that you then proceeded to Port Darwin and were diverted from that route after one night? A. In order to get from Brisbane to Darwin, we went through what is called the "Barrier Reef"; that means running between the mainland of Australia and a little string of shoals and coral islands off the coast. And this here Barrier Reef reaches up all the way to Torres Strait; and it was in Torres Strait that I got signals from a signal station 1580
ashore to come into port for orders.

1384XQ. And you put into port, did you? A. I put into port for orders, yes.

1385XQ. And what orders did you receive there? A. There were no American authorities in the port; just the Australian Navy there. They told me that I was not to proceed any further until two Australian corvettes came up from the south to escort us to Darwin. When I say "us", I mean there were two ships laying there already, one being the American Army Transport *Meiggs* and one the Matson Line *Mauna Loa*. They were laying in the harbor already when I got there.

1386XQ. Would you characterize those orders as orders 1581
to join a convoy? A. Yes, sir.

1387XQ. You had seen many such orders in the course of sailing operations in war time, had you not? A. I had been told in Sydney that proceeding to Darwin I was to receive orders from the Australian naval authorities whenever I got in touch with them.

1388XQ. But, during your days at sea, during the last war, did you receive many orders about joining convoys? A. Yes, sir.

1389XQ. It was quite a common instruction to receive during the war time, wasn't it? A. Yes, sir.

1390XQ. And this was such an instruction, wasn't it? A. Yes, sir.

1582 *Excerpts from the Testimony of Captain Axel Michelson.*

1391XQ. I believe you previously testified that you did wait for the Australian corvettes and that they did appear; is that correct? A. Yes, sir.

1392XQ. And that then you proceeded in convoy to Port Darwin? A. Yes, sir.

1393XQ. Now, when you got to Port Darwin, did you receive any orders or instructions? A. When I got to Darwin, I reported to the Australian Naval Control, as I testified here yesterday; and Lieutenant Gollar of the Australian Navy he took me down and introduced me to
1583 this here Lieutenant-Colonel Jones that I believe I also mentioned here yesterday——

Mr. Smith: Yes.

(Answer continued):—This here Lieutenant-Colonel Jones he was, in sailor's language, executive officer for the commanding officer, who was Colonel Robinson. I remember he took me in and introduced me to Colonel Robinson.

1394XQ. And what instructions or orders were given you at that time? A. Colonel Robinson he told me that my cargo was very badly needed and he wished that they could have started to discharge it immediately, but, he says,
1584 "Lieutenant-Colonel Jones, he will take care of you, Captain, and it will be taken out of you as soon as possible."

1395XQ. That was the first instruction you had had about your cargo at Darwin, was it? A. Yes, sir.

(Discussion off the record followed.)

1396XQ. Now, did you receive any other instructions about the cargo while you were in Darwin; and, if so, what instructions? A. Well, what I said just about covered the whole thing. I understood they were going to take all the cargo out of the ship.

1397XQ. And you have previously testified that they did take it all out, except about 1500 barrels of high-octane gasoline, and then reloaded 300 of those barrels, so that.

you had a total of 2,000 aboard; and then you received instructions to take those 2,000 barrels to Wyndham? A. That's right.

1398XQ. And you protested that you didn't think it was wise and the order was confirmed and you proceeded to Wyndham to deliver the 2,000 barrels under the circumstances you previously testified to and returned to Darwin; is that correct? A. I didn't protest about my cargo being taken out, because by that time I had come to realize they knew more about the war than I did, and the American authorities—or American army—in Australia needed them desperately. 1586

1399XQ. I understand your protest was only about using the *Portmar* as a small boat to deliver 2,000 barrels, when smaller vessels were available. A. That's right; I protested strongly against that.

1400XQ. Now, then, were there any other instructions, not covered by that outline, which you received from any official source concerning your cargo while you were in Darwin or Wyndham? A. No, sir; not that I can remember or think of.

1401XQ. Now, does your logbook show your vessel's draft marks at various times? A. Yes, sir. 1587

1402XQ. Do you have a notation of your draft marks after you had returned to Darwin from Wyndham? A. Yes, sir, I believe so.

1403XQ. Would you let me know what those draft marks are. A. (Witness examines log.) In the morning after we had arrived from Wyndham, the draft was, at 8 o'clock, 10 feet and 7 inches forward and 14 feet and 3 inches aft, making a mean draft of 12 feet and 5 inches.

1404XQ. Now, do you have in your log a notation of your draft marks after you had taken aboard the 75's and the other materiel and the troops which you took aboard at Darwin after your return from Wyndham? A. When we left Darwin for Koepang, the draft was;—forward 11

1588 *Excerpts from the Testimony of Captain Axel Michelson.*

feet and 4 inches, and aft 15 feet and 2 inches, making a mean draft of 13 feet and 3 inches.

1405XQ. Now, for convenience, would you tell us what was the difference between the mean draft after your return light from Wyndham and the mean draft after you had loaded and were about to depart for Koepang? A. Ten inches difference.

1406XQ. About how much cargo would that indicate you were carrying, Captain? A. Well, as near as I remember, it was roughly 40 tons to an inch; ten times 40 would
1589 make 400.

1407XQ. Is that about the amount of cargo you had aboard? A. I couldn't say, because we did something to our water.

1408XQ. Did you take on any bunkers? A. No, we didn't take on any bunkers. But what was done to the water I am not quite certain of, but it seemed they took water off the *Portmar* along side of the wharf, because the drinking water they had in Darwin was none too good. But I am not certain whether it was done or not.

1409XQ. Now, were the instructions you received about proceeding to Koepang in addition to the instruction to go
1590 to Koepang what you would term routing instructions? A. Yes, sir.

1410XQ. And was the conference which you previously testified about,—aboard the *Houston*, was it? A. Yes, sir.

1411XQ. —A convoy conference? A. Yes, sir.

1412XQ. Have you attended many such convoy conferences in the course of the war? A. Yes, sir.

1413XQ. Now, would you indicate on the chart the approximate route which you were to follow from Darwin to Koepang, if you can, or is this too small a scale for you to follow? A. There is Darwin Harbor; there is Koepang——

1414XQ. Were you going direct route to Koepang? A. We steered a little to the south and west of Koepang on most of the course that we ran until we turned back.

In other words, the course we steered was to the left of what a direct course for Koepang would have been.

1415XQ. Now, how far about would you say that course would take you, at its nearest point, from a line between the points which you have marked "6" and "7" of your projected route, according to your routing instructions which you received in San Francisco? A. Two hundred to two hundred and fifty miles, roughly. I am hanging in the air, because I don't know if that mark I put down there is in the right place.

Mr. Smith: Just roughly is all you can possibly give us, Captain; we understand that. 1592

Commissioner Cowen: That's right.

1416XQ. Could you indicate with a circle and the letter "c" the approximate position of your convoy when the Japanese attacked?

Mr. Murphy: You mean on the second day, on the 16th?

Mr. Smith: That's right.

A. (Witness marks chart as requested.)

1593

Mr. Murphy: That is the main attack,—on the second day?

Mr. Smith: That's right.

Mr. Murphy: On the 16th?

Mr. Smith: That's right.

By Mr. Smith:

1417XQ. And I believe you have previously given us an estimate of the distance from that point to your point "6"; will you please re-estimate that distance from the point of attack to the point "6" on your projected route from San Francisco. A. 250 miles.

1418XQ. Thank you, Captain. Now, during the bombing attack,—that is, during the attack at sea at the point which you have indicated on the chart,—was your vessel subjected to cannon fire by attacking airplanes? A. No, sir.

1419XQ. Was any structural damage sustained by the hull of your ship, so far as you know? A. I believe that she was severely weakened.

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1433XQ. Now, when these bombs dropped alongside,—first to the port side and then to the starboard side,—did
1595 that have a twisting effect on your vessel at all? A. Well, I would simply say that it had a weakening effect. It would move the plates and the rivets against the ship's frames.

1434XQ. It would move the plates against each other and against the frame; is that right? A. Yes, sir.

1435XQ. And put a severe strain on the frame? A. On the rivets and on the frames.

1436XQ. Now, whereabouts did your bilge lines run, Captain? A. I don't know, sir, not for certain. I had a good chief engineer, and that was his job, to take care of that.

1437XQ. Well, did they run from the engineroom along
1596 the ship to the various bilges? A. In a general way, yes, sir.

1438XQ. Do you know what they were constructed of? A. I dare say that was specification pipe.

1439XQ. And now you say that those lines ruptured—some of those lines; is that right? A. Yes, they did.

1440XQ. Have you any idea how many of those lines ruptured? A. No, sir, I have not.

1441XQ. Were there more than one? A. Yes, sir.

1442XQ. Lines ran to both the No. 4 and 5 hold bilges; is that correct? A. Yes; as I understand it, yes.

1443XQ. What would that indicate as to the movement of the frame and the plating of your ship under the impact of these bombs? A. Well, I would say that there is very

little relation between the movements of the plates and the frames and the breaking of the bilge lines.

1444XQ. What do you think caused them to break? A. Undoubtedly, it was the severe strain put on them.

1445XQ. By the concussion of the bombs; is that right? A. Yes, sir.

1446XQ. Against your ship, not against the lines themselves? A. Against the ship, yes, sir.

1447XQ. Now, you say that, after the bombing attack, you noticed the vibration of your ship had changed; just how had it changed,—was it greater or less? A. It was much less. 1598

1448XQ. Did that indicate to you that the machinery had loosened itself on its bed; or just what did that indicate to you? A. Yes, it did.

1449XQ. That the machinery had shifted? A. It indicated that the structure of the ship had weakened, because one solid piece will work together; and, if it's loose, there will be far less vibrations than there are when it's hooked up hard together.

1450XQ. Do you think that the plating had loosened? A. That's what I thought they had.

1451XQ. The plating had loosened? A. The whole structure of the ship. 1599

1452XQ. Now, you mentioned the fact that the Chief Engineer had mentioned to you that the boilers had shifted in their saddle? A. I believe I said that the port boiler had moved in the saddle.

1453XQ. Again, I bring your mind back to this breaking of a piece of wire by bending it; can any movement of the boilers—severe jarring of the boilers—weaken the boilers, in your experience? A. It wouldn't do them any good.

1454XQ. It might make it dangerous if they were under heavy steam pressure; might it not, Captain? A. I would say so.

1600 *Excerpts from the Testimony of Captain Axel Michelson.*

1461XQ. Now, in the attack on the *Portmar* in Darwin Harbor, you testified that some bombs fell pretty close thereto; is that right? A. Yes.

1462XQ. Did they lift the ship out of the water at all? A. Yes, sir.

1463XQ. Did that strain the plating and the framing etc., in your opinion? A. In my opinion, yes, sir.

1464XQ. Did that weaken the plating and the framing, in your opinion? A. Yes, sir.

1465XQ. Was there any further rupture of the piping
1601 inside the vessel as the result of those bombs? A. I wouldn't like to say much about that, because that last afternoon we were there everything was so hectic that the Chief Mate told me lots of things that I don't remember today.

1466XQ. Now, you say that a great deal of paint and scale accumulated in the bilges; is that correct? A. Yes, sir.

1467XQ. Did that indicate that the paint and scale had been knocked off the plating and the trim by the terrific concussion? A. That's what it indicated.

1468XQ. That is the only way it could have been done? A. Yes, sir.

1469XQ. Now, when your cargo was on fire, were there
1602 any explosions in your hold? A. Small ones, yes.

1470XQ. Ammunition occasionally would go off inside your hold? A. Yes. I saw a man with a case of ammunition and I saw the cartridges exploding while he was handing it to a fellow on deck to throw overboard. I could see that from the bridge.

1471XQ. And could you feel the concussion of the explosion up on the bridge? A. Not from that.

1472XQ. Now, I think you described very graphically how the cannon fire damaged your ship, but could you give us a little bit more detailed information as to the size of the holes made in the hull by the aerial cannon? What were the largest ones in diameter,—to the best of your recollection? A. There were very few of those holes that were round; they were all jagged holes. They seemed rather to be tears than penetrations.

1473XQ. What would be the longest dimension of the largest hole, as best you remember? A. Seven or eight inches.

1474XQ. Seven or eight inches? A. Yes, sir.

1475XQ. And the holes would range down to holes having the longest dimension of how many inches; what would be the longest dimension of the smallest hole? A. There were a very few circular holes, just about the size of a dollar; but they were only a very few. Most of them they were jagged holes from the size of a dollar and up to what I was describing here.

1604

1476XQ. Now, you mentioned that ammonia fumes were escaping from your refrigerating system; was that from the concussion of the bombs or was that caused by the cannon fire. A. I believe that was caused by the machine-gun fire.

1477XQ. Where was the refrigerator located, Captain? A. On the shelter deck.

1478XQ. Did that get perforated by machine-gun and cannon fire? A. The main deck got perforated, I dare almost say, in hundreds of places.

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1484XQ. Now, when you ran aground, the vessel started 1605
to make water faster than you could get it out? A. She did.

1485XQ. And she started to list over on her side? A. Yes, sir. That was by that additional mishap that she hit on the starboard side; if she had hit on the port side, she would have been all right.

1486XQ. Did you consider that the *Portmar* was going to continue in operation as a ship after that? A. Mr. Smith, that afternoon I wasn't thinking of what profits the owners they would make with the *Portmar* in the future. I was just thinking of doing the best I could for the ship.

1487XQ. And for your men? A. And for my men.

1488XQ. There are always things you can salvage from a ship, even if it is grounded on a beach? A. Yes.

1489XQ. And you wanted to salvage what you could by getting up on the beach? A. By running ashore, we had a chance to salve as much as possible. Letting her sink up in the bay like the rest of them did, there would be nothing to do but swim for it.

1490XQ. You might be able to get the guns off her; you might be able to get valuable equipment off her; is that right? A. Right.

1491XQ. And the men would be saved? A. Yes, sir.

1492XQ. That was what was in your mind primarily, Captain? A. Yes, sir; mostly the men.

1607

1493XQ. Now, after you got off the *Portmar* on the beach and had an opportunity to examine her condition, in the light of what she had been through, did you think the *Portmar* worth repairing as a ship, Captain? A. She certainly would have been if it hadn't been for the war situation and the position she was in.

1494XQ. Captain, did you send some cables or telegrams to your owners about that? A. Yes, sir, I did.

1495XQ. What did you tell your owners about that? A. I told my owners I thought that the *Portmar* could not be repaired, because she was in such a position up there and conditions were such that nothing could be done to her at a

1608

cost which would make it possible for the owners or anyone else to care for repairing her.

1496XQ. Captain, sometime later, when you knew the *Portmar* was afloat and was being towed down, did you express an opinion to your owners as to whether the *Portmar* would be worth repairing, even if she was gotten to Sydney? A. Yes, I believe I did.

1497XQ. And what was that opinion, Captain? A. Well, I wouldn't dare to say exactly what was in the telegram. I was fixed like a good many others in those days; I had to change my mind quite often.

1498XQ. I show you a cable, which you sent from Melbourne; and ask you if that refreshes your recollection as to the opinion you expressed.

Mr. Murphy: May the record show what the number of the exhibit is that the witness is looking at?

A. Yes, sir, I sent them that telegram.

Mr. Smith: May the record show that the witness has refreshed his recollection by looking at Plaintiff's Exhibit 29.*

1499XQ. You state in this telegram that that is your considered opinion: "My own but unchanged well considered opinion that ship constructive total loss." Did that 1610
correctly state your view at that time? A. That was my opinion when I sent the telegram.

1500XQ. And was that your opinion when you last saw the *Portmar* on March 3rd, Captain? A. I wouldn't like to say what my opinion was on the 3rd of March, because I wasn't thinking of leaving Darwin then; I was thinking of staying with the *Portmar.*

1501XQ. I am not asking whether or not you wanted to leave the *Portmar;* I am asking you whether, when you were last on board the *Portmar,* you considered her to be a constructive total loss and not worth repairing as a ship. A. Yes, sir. 1611

1502XQ. You wanted to stay by the *Portmar* until you could get instruction from your owners and to save what you could out of her? A. That's right.

1503XQ. But you didn't think she was a going concern as a ship any more; is that right, Captain? A. I didn't think she was a very good ship, no.

1504XQ. She was a wreck, Captain, as far as you could judge? A. Yes; that is, not any wreck in this sense, that she couldn't be made into a ship again.

1505XQ. By spending more than she was worth on her? A. Yes, that's the way I figured it.

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* Libelant's Exhibit 20, Deposition Exhibit 25, in present cases; cable dated April 29, 1942.

1612 *Excerpts from the Testimony of Captain Axel Michelson.*

Re-direct examination by Mr. Murphy:

1513RDQ. Did you notify your owners of the points stated in the naval orders that were given you before you sailed in the *Portmar* from San Francisco; did you tell the owners that you had received those orders and what those various points were that you were ordered to pass through? A. I never mentioned to anyone before here yesterday, and I am sorry I did so yesterday.

1514RDQ. Will you answer the question: did you notify
1613 your owners at the time you got the orders before you sailed? A. No, sir, absolutely not.

1520RDQ. In case it isn't in the record yet, what kind of fuel did the *Portmar* burn? A. Fuel oil.

1521RDQ. Her engines were steam engines?— A. Steam engines.

1522RDQ. And the steam was generated by oil fuel? A. That's right.

1523RDQ. Now, the last time you saw the *Portmar* on the shoal, what was the first requisite, the first step, that would have to be taken, in your opinion, to begin the
1614 salvage of that vessel? A. The first steps would have been to get steam and to get pumps to take the water out of the ship after the holes had been temporarily patched up.

1524RDQ. Was there any power on the *Portmar* to drive the pumps—the pumps you have in mind? A. None whatever.

1525RDQ. And by "steam" you mean power for the pumps, whether steam or oil or any kind of engine; is that it? A. Any kind of good power.

1526RDQ. So far as you know, were any such gear,—pumps and power equipment,—available in Darwin at the last time you saw the *Portmar*? A. No, sir, I know there was not. I am almost absolutely certain.

1527RDQ. Did Captain Williams ever tell you where he got the pumps and the power machinery to work those pumps which he used in the salvage of the *Portmar?* A. Yes, sir, he did. He told me up in Sir Owen Dixon's office that he got them from South Australia.

1528RDQ. How did he get the pumps there? A. I wouldn't know. He had some kind of a salvage organization himself.

1529RDQ. Did he say whether he received any assistance in sending those pumps and engines across the continent to Port Darwin? A. Yes, he did. He said the Australian Government had made it possible for him to get the pumps to Darwin. 1616

* * * * * *

471Q. All right. Describe the events after the *Neptune* was destroyed. A. The next ship I saw them go after, after that, was the two American destroyers. They went over the *Perry* and they hit the *Perry,* and I saw the *Perry* blow up. She blew all to pieces—I could see her decks come up, and then she sunk. That was the last of her. I took a look at the *Preston,* and I saw that they had hit her also. She was afire in one place,—from the forward stack. I saw her ablaze from the forward stack in just one place. 1617 She was moving when last I saw her. Then they gradually come over the bay.——

472Q. Up to this time, had there been any direct attack on the *Portmar?* A. No, sir. Then they came back over the ships in the bay and started bombing one after another the ships out in the bay. They got the *Meiggs*——

473Q. The *Meiggs* is the United States transport? A. United States transport.

474Q. What did they do to the *Meiggs?* A. They bombed her, and I saw her sink. I saw them bomb the *Mauna Loa,* and I saw her sinking. She came up in the water with her stem, and went down stern first. That took a little time, though. After they got the two, they started to pay attention to us. They came down over us, but first

started machine-gunning. The sun was in the east, and they came up from the east and from the side of the town and over the ship time and again and machine-gunned us. They would just make a round turn, go off into the sun again, and come back and work over us again.——

475Q. Was there any anti-aircraft fire from shore against these Japanese aircraft? A. I believe I heard a couple of shots when they first went over Darwin. That died away in no time at all, and there was no resistance from the Port Darwin guns.

1619 • • • • • • •

538Q. Now, to return to the damage in your quarters, we have here some logs of the *Portmar* and it also appears that you turned in some secret codes to the Australian authorities, which we will come to presently; where were those papers on board the *Portmar*? A. Those papers they were in the wheelhouse.

539Q. In what? A. I had a canvas bag I had made myself for those papers and I had this bag weighted down with scrap iron the Chief engineer had given me, and we had orders to make certain, no matter what happened, those codes we had wouldn't fall in enemy hands. So all im-
1620 portant papers,—such things as my official log, the ship's logbook, her shipping articles, a few of the ship's documents,—I kept them in that canvas bag; and the Mate and myself knew where the canvas bag was and knew what to do with it if anything happened to me,—to put it over the side. And I remember very carefully telling him whenever he wrote out the log, to just go down and write it up and bring it back and put it in the canvas bag again.

540Q. So that was the way those books and documents got off the ship? A. Yes, sir.

541Q. What effect did the bombing have on the wireless shack and the wireless apparatus? A. The wireless shack was blown clean off the foundation; you could see clean underneath the house; and you could see the apparatus —the wireless—exposed.

1621

Deposition of Roy John Mark Merrett.

Respondent Underwriters' Exhibit 1.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libellant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Admiralty 133-332.

1622

Deposition of Roy J. M. Merrett, taken by Proctors for Respondents, pursuant to notice, held at the office of Mendes & Mount, Esqs., 27 William Street, New York, N. Y., on the 26th day of July, 1949, at 2:00 p. m.

Appearances:

1623

Messrs. KIRLIN, CAMPBELL, HICKOX & KEATING (EDWIN S. MURPHY and H. C. CUNNINGHAM), Proctors for Libellant.

Messrs. MENDES & MOUNT (RUSSELL T. MOUNT and WALTER B. HALL), Proctors for Respondents.

It is hereby stipulated that the testimony may be taken by a stenographer, signing, sealing, filing and certification being waived and stenographer's fees to be taxable.

It is further stipulated that Respondents will furnish to Libellant a copy of the within deposition.

1624 *Deposition of Roy J. M. Merrett—Direct.*

ROY JOHN MARK MERRETT, called as a witness by respondents, having been first duly sworn by Paul D. Hammer, a Notary Public, testified as follows:

Mr. Hall: This will be a deposition of Roy J. M. Merrett, a witness on behalf of respondents, taken by deposition *de bene esse* pursuant to notice served on proctors for libellant July 18, 1949, taken on July 26, 1949, starting at 2:35 p. m. at the office of Mendes & Mount, Room 1002, 27 William Street, New York City. The purpose of taking the testimony of Mr.
1625 Merrett, I would like to state at this time, is particularly related to the 45th, 46th and 47th articles of the answer of these respondents, which relates to the set-off based upon a fair and reasonable additional premium within the "held covered" clause of the policy, if the Court should hold that the "held covered" clause is applicable to keep the policy in force beyond February 13, 1942.

Direct examination by Mr. Hall:

Q. What is your profession or occupation, Mr. Merrett? A. I am an active marine underwriter at Lloyd's.

1626 Q. And how long have you been so employed or engaged? A. I commenced as a marine underwriter on January 1, 1935.

Q. During 1941 and 1942, were you engaged in underwriting hull war risks on vessels and cargoes? A. I was.

Q. For how many years prior to that had you been underwriting war risks? A. I think in 1937, 1938, at the time of the Spanish Civil War, war risks became an important factor and I was interested from then on.

Q. Are you still so engaged? A. Yes, sir.

Q. Let me ask at this time, do you know the underwriter for the Edinburgh Insurance Company, Ltd., in 1941? A. In 1941 the underwriter of the Edinburgh Company was Mr. Alexander Kennedy.

1627

Q. Is Mr. Kennedy available as a witness anywhere today, do you know? A. He died in about 1942, I think.

Q. Did you have anything to do with war risk hull insurance on the SS. "*Portmar*" for trading for one round voyage from United States Pacific port or ports, to a port or ports in the Philippine Islands, returning to the United States North Atlantic port or ports in or about the month of November, 1941? A. I did.

Q. So that you are interested in the outcome of the present litigation by the Calmar Steamship Company? A. Yes.

1628

Q. And you are one of the named respondents in this action; is that right? A. Yes, sir.

Q. Did you know, in 1941 and 1942, in general, what war risks other marine underwriters at Lloyd's and other British insurance companies were accepting and what premiums they charged for it? A. Yes.

Q. Did you personally accept or underwrite any war risk insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in any active war areas? A. No, sir.

Mr. Murphy: I object to that question as immaterial.

1629

By Mr. Hall:

Q. State whether or not you would have accepted or underwritten any war risk hull insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in active war areas if application had been made for such insurance?

Mr. Murphy: I object to that question on the ground that it is neither competent nor material as to what this witness would have done if a situation had been presented to him, and furthermore on the ground that it calls for a conclusion and is therefore objectionable.

A. No, sir.

Q. Did you accept any such risks in 1942? A. No, sir.

Mr. Murphy: Same objection.

Q. Assume that an American merchant vessel bound from United States ports to ports in the Philippines in December, 1941, had because of Japanese attacks in December, 1941, changed her course and had proceeded to the Fiji Islands, thence to Sydney, Australia, thence under military or naval instructions of either or both the United States and/or Australia, proceeded along the east coast of Australia
1631 and to Port Darwin and Wyndham on the north coast of Australia, would you or would you not have accepted or underwritten war risk hull insurance on such a voyage in waters north of Australia in January or February, 1942?

Mr. Murphy: I object to that on the ground that it is incompetent and immaterial for this witness to testify as to what he would have done under a given set of circumstances.

The Witness: No.

By Mr. Hall:

1632 Q. Assume an American merchant vessel bound from the United States to ports in the Philippines in December, 1941, had, because of the Japanese attacks in December, 1941, changed her course and proceeded to the Fiji Islands, thence to Sydney, Australia, and thence under military or naval instructions of either or both the United States and/or Australia proceeded along the east coast of Australia and to Port Darwin and Wyndham, did you at any time in 1941 or 1942 accept or underwrite any war risk hull insurance in the waters north of Australia?

Mr. Murphy: Same objection.

A. Not to the best of my knowledge.

Q. Assuming the voyage I have just referred to in the last question, that an American vessel was making or intending to make a voyage along the northern coast of Australia between Port Darwin and Wyndham and a voyage between northern Australia and the Island of Timor, carrying ammunitions and troops at a time when it was known to be an active war area, would you or would you not have accepted or underwritten war risk hull insurance on such a voyage?

Mr. Murphy: I object to that question on the ground that in so far as it relates to a proposed voyage to Wyndham it is not within the issues framed 1634
by the pleadings. As to the rest of the question, I object on the ~~same grounds as stated heretofore~~, that it is incompetent and immaterial for the witness to state what he would have done in a given set of circumstances.

The Witness: The answer is no. May I interrupt for one moment, Mr. Hall?

Mr. Hall: Yes, certainly.

The Witness: I want to refer to a question you asked me a few moments ago. You asked me if I was interested in the result of this action, and I said yes. I think you then followed it by a question which I am 1635
not quite sure I understood properly, if I was a party to the action.

Mr. Hall: I said, "* * * and you are a party to the action."

The Witness: Am I a party to the action?

Mr. Hall: The nominal party is Sydney Keith Scott.

The Witness: He is the name I nominated for the action and I myself do not appear in it in that way.

Mr. Mount: Not as a named party.

The Witness: Not as a named party. I want to make my position clear.

Mr. Hall: We want it to appear that you are an interested party here.

1636 *Deposition of Roy J. M. Merrett—Direct.*

The Witness: But I am not a named party, which I believe you did state in your question.

Mr. Mount: You are not a named party.

By Mr. Hall:

Q. Assuming that an American merchant vessel in January and February, 1942, was making or intended to make a voyage along the northern coast of Australia and between northern Australia and the Island of Timor, carrying ammunition and troops, at a time when it was known to
1637 be an active war area, are you able to state what a reasonable rate of premium for such a voyage would be for war risk hull insurance? A. Yes.

Mr. Murphy: Before that answer, I object to the question on the ground that no proper foundation has been laid for such testimony by this witness. Also, I wish to add to my objection, on the ground that in so far as it refers to a voyage along the northern coast of Australia, it does not appear to call for testimony within the issues of the case.

By Mr. Hall:

1638

Q. What would have been the amount of such premium? A. Fifty per cent.

Mr. Murphy: Same objection.

Q. Assume that an American merchant vessel in January and February, 1942, was making or intended to make a voyage between the northern coast of Australia and the Island of Timor, carrying ammunition and troops, at a time when that was known to be an active war area, are you able to state what would have been a fair rate of premium on such a voyage?

Mr. Murphy: Objection on the ground no proper foundation has been laid for that testimony.

A. My answer is 50 per cent.

1639

Q. Will you assume that the SS. *"Portmar"* was a registered United States siggle-screw, ocean cargo steamship of approximately 8,600 tons dead weight, built in 1919, classified 100 A-1 with Lloyd's register of shipping and owned by the libellant herein, Calmar Steamship Corporation; assume further that the SS. *"Portmar"* sailed from San Francisco on or about November 28, 1941, bound for Manila in the Philippine Islands; and that the Japanese government declared war on the United States on December 7, 1941, and thereupon invaded the Philippine Islands; that on December 11, 1941, the Steamship *"Portmar"* ceased following the voyage to Manila and proceeded to the Fiji Islands where she arrived December 20, 1941, thence to Sydney, Australia, where she arrived on or about December 30, 1941, thence to Port Darwin where she arrived on or about January 19, 1942, thence to Wyndham, Australia, where she arrived on or about February 8, 1942; assume further that after all the outbound cargo of the *"Portmar"* had been discharged at Wyndham, Australia, on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on February 12, 1942; that she went to berth there on or about February 13, 1942; assume further that the SS. *"Portmar"* was there loaded with stores, military equipment, ammunition, 75 caliber field guns and between 300 and 400 officers and men of the United States Field Artillery, all to be sent to Koepang on Timor Island; assume further that the commander of the United States Navy Cruiser *"Houston"* stated to the master of the *"Portmar"* that it would be a very dangerous mission; that Koepang harbor was going to be a hot place; that the Cruiser *"Houston"* would not even dare to escort the *"Portmar"* into the harbor; that the said cruiser would accompany the *"Portmar"* to the entrance and that the commander of the *"Houston"* then said, "Gentlemen, I am sorry to say I have got to get out. You have got to get in and do the best you can;" assume further that the master of the *"Portmar"*

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had heard that an Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang on January 29, 1942, and that it was common knowledge on February 14, 1942, at Port Darwin that the Port of Koepang had already been bombed by the Japanese; assume further that it is held by the Court that the insured voyage of the "*Portmar*" from Pacific United States port to the Philippines and return was not broken up, terminated and abandoned on or prior to February 13, 1942, but that the voyage I have described constituted merely a change of
1643 voyage within the wording of the policy; and assume further that the policy involved includes the clause "held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage provided prompt notice be given these insurers when such facts are known to the assured and/or their managers, and an additional premium paid if required", or words to that effect, will you state whether or not you accepted or underwrote any war risk hull insurance on such voyages in 1942?

Mr. Murphy: I want to be sure before I state an objection that I correctly understood the conclusion of your question. Am I right in saying that I under-
1644 stand you are asking this witness to testify whether he did as a matter of fact underwrite or write insurance on any such voyage in 1942? Is that the correct nature?

Mr. Hall: Yes.

Mr. Murphy: I wish to note an objection only to certain parts of the question which appear to paraphrase portions of the evidence not accurately and reserve the right to correct the question in the event that it does appear to be inaccurate. I have not the time now to read the whole record in the case in order to verify the exact wording.

Mr. Hall: I think since the witness is not going to be here on the trial you ought to state the nature

1645

of the details to which you take exception to the question at this time.

Mr. Murphy: Then I will have to take a moment. In one respect the witness is asked to assume as a fact that that Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang at some time prior to the date in question. There is no evidence in the case that such was the fact. That is all I have at the moment.

By Mr. Hall:

1646

Q. Include also as a fact the point made by Mr. Murphy that there is no evidence that the Empire Airways flying boat had in fact been destroyed. A. May I answer the question now, sir?

Q. I haven't come to the question yet. I have merely given you the assumptions I wanted you to make. State whether or not you accepted or wrote any war risk hull insurance on such voyages in 1941 and 1942?

Mr. Murphy: I object to the question on the ground that it is incompetent and immaterial as to whether the witness accepted or wrote any such hull insurance.

1647

A. To the best of my knowledge and belief, no.

Q. State whether war risk hull insurance on such a voyage was written at Lloyd's or elsewhere in the London market?

Mr. Murphy: I object to that question on the ground that it has not been shown that the witness knows whether or not such insurance was written.

The Witness: To the best of my knowledge and belief, no.

By Mr. Hall:

Q. Can you state what would be a fair and reasonable rate of premium for such insurance coverage?

1648 *Deposition of Roy J. M. Merrett—Cross.*

Mr. Murphy: I object to that question on the ground that no proper foundation has been laid for it.

A. Fifty per cent.

Q. Will you state the basis for your statement of 50 per cent as the reasonable premium for such coverage?

Mr. Murphy: Same objection, and also on the ground that it seeks an elaboration by the witness of an opinion for which no proper foundation has been laid.

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A. I feel that the additional premium of 50 per cent is founded upon the hazards of the risk in question, the likelihood of the vessel's survival on such a voyage, and in general practice I would regard 50 per cent as a maximum additional premium which one could reasonably ask any insured to pay.

Q. What experience had you had in and prior to 1942 in fixing rates of war risk premiums at Lloyd's? A. The experience arising from leading very many such insurances which were placed in Lloyd's market, in numbers probably running into many hundreds or thousands of cases.

Q. Did you yourself, acting for yourself and/or for

1650 others, fix or accept rates on what you would call thousands of risks, war risks, on hull insurance? A. Yes, sir.

Q. Did you know what other hull war risk insurance was being placed at Lloyd's during 1941 and 1942? A. As an active underwriter in the market, yes.

Q. Did you know what premiums had been charged there during those years for the several risks? A. Yes, sir.

Mr. Hall: Your witness.

Cross examination by Mr. Murphy:

Mr. Merrett, you are a member of one of the syndicates on the Lloyd's policies issued with respect to the "*Portmar*", are you not? A. I was the active underwriter for the syndicate which leads the insurance.

1651

Q. You used the expression "which leads the insurance" and you also used that expression in your direct testimony. Will you tell us a little more what you mean by that term? A. Certainly, sir. When a broker is effecting an insurance in the Lloyd's market, or, indeed, in the London market, it is necessary for them to agree to terms of the insurance and its conditions and the rates of premium, with the underwriters, and with that object in view the details of the insurance are set down on what we call the slip which is a piece of paper containing those details. The person who has the responsibility of putting down his subscription first on the slip is known as the leading underwriter on the insurance and it is he who makes the bargain with the broker which is struck in regard to the insurance in question.

1652

Q. And do I understand that the leading underwriter then visits the other underwriters at Lloyd's on the floor and submits the risk to them to see if they wish to take part of it? A. No, sir. The leading underwriter accepts such proportion of the risk as he himself desires to take for his syndicates and the broker takes it around to the underwriters.

Q. Then to understand your expression of being a leader on the risk, it means you are the first one on? A. Yes, sir.

1653

Mr. Murphy: At this time, unless you object, Mr. Hall, I would like to offer in evidence the policies involved in this case.

Mr. Hall: No objection.

Mr. Murphy: I have here the original policies. First of all, Lloyd's policy which appears to bear the number of this risk D41/11356, dated February 12, 1942. I will ask that that be marked Libelant's Exhibit 51.

(Policy No. D41/11356, dated February 12, 1942, received in evidence and deemed marked Libelant's Exhibit 51.)

By Mr. Murphy:

Q. Would you like to look at that? A. Certainly.

Mr. Murphy: At the same time, I offer a policy apparently numbered 568, also bearing the No. D41/11356, this being the policy of the Institute of London Underwriters.

(Policy numbered 568, also bearing No. D41/11356, being policy of the Institute of London Underwriters, received in evidence and deemed
1655 marked Libellant's Exhibit 52.)

Mr. Murphy: Finally, the original policy of the Excess Insurance Company, Ltd., bearing apparently their number, 42/1426; down at the foot, D41/11356, the latter apparently being the broker's number assigned by Messrs. Thos. Stephens & Sons, Ltd.

(Policy numbered 42/1426, being policy of the Excess Insurance Company, Ltd., also bearing No. D41/11356 received in evidence and deemed marked Libellant's Exhibit 53.)

1656 By Mr. Murphy:

Q. Mr. Merrett, you have that Lloyd's policy before you. Will you tell us which syndicate was the one you were a member of? Do you know the number? A. Yes, sir. You used the expression "member of". I have used in reply "active underwriter for".

Q. I see what you mean. Am I to understand that you managed the affairs of that syndicate? A. At that time, yes, sir.

Q. Which number is it? A. 422 and 420.

Q. Looking at the list of members under syndicate 422 and syndicate 420, as they are set forth on the back of this policy, I notice that your name is not listed. Are we to understand that you were nevertheless active or the active

manager of those two syndicates on this list? A. I was the active underwriter for those two syndicates on this risk.

Q. Are we to understand that in the event that the underwriters are liable on this risk to Calmar Steamship Corporation, that you yourself are personally liable for a portion? A. I am liable in this way, sir, that each year's insurance account is terminated or closed by reinsurance in a succeeding year, and in a succeeding year I became a member of the syndicate and therefore I have carried my share of the liability of the reinsurance.

Q. And does that apply to this risk on the *"Portmar"* involved in this case? A. Yes, sir. 1658

Q. You were asked as to whether or not, within your knowledge, any risk such as the risk set forth in the hypothetical question put by Mr. Hall on the *"Portmar"* was accepted or underwritten at Lloyd's. Are we to understand that you know all that goes on in Lloyd's at all times? A. I couldn't say that, sir.

Q. And it is a large institution, is it not? A. Yes, sir.

Q. And it is always possible that some risks may be taken and led by an active underwriter and apportioned among other syndicates that you may never hear of at all? A. That is possible, sir, but in the case of war risk insurance at this time, most improbable. 1659

Mr. Murphy: I have nothing further.

Re-direct examination by Mr. Hall:

Q. You will note that Lloyd's policy, Libellant's Exhibit 51, is dated 19 January 1942? A. That is so.

Q. Does that indicate when the risk attached under the policy? A. Oh, no. No, that is merely the date on which the policy itself was signed. I beg your pardon. That was the date on which the policy itself was prepared by the insurance brokers for signature.

Q. Please explain the procedure whereby the risk was assumed under the policy prior to its issuance? A. I have

already described the way in which the underwriters assume their liability on slips. As soon as the underwriter commits himself upon the slip, he is at risk—he is positively at risk. The actual signature of the policy is made from the slip later on, and in this case it was not until the 19th of January, 1942, that the brokers caught up with preparing a document for signature in respect of this insurance.

Re-cross examination by Mr. Murphy:

Q. What about that date at the top of the first front
1661 page, February 12, 1942? A. That is the date, Mr. Murphy, which the Lloyd's policy signing bureau attaches when they have actually completed their own act in signing the syndicates on to the policy.

Q. Is it your understanding that the policy is not complete until the signing bureau issues it or puts its stamp on it, as you have described? A. The policy itself is not complete but the insurance is effective nevertheless.

Q. And are we to understand, then, that the insurance on that policy took effect January 19, 1942? A. No, sir; the insurance took effect for the voyage which is described in it, which occurred, I think, in the month of November or
1662 December, 1941. May I point out something else here?

Q. Go ahead. A. It says on the policy: "Warranted sailing as per slip." I have no doubt that in the slip, to which I have already referred, a sailing date was set down, but for reasons of security that would not have been quoted in the document itself during the war, but the date on which I accepted the insurance is shown here as underwriter's reference, 26th of November, 1941.

Q. You are now referring to the column headed "Underwriter's Reference" on the back of the first sheet? A. Yes, sir.

Mr. Murphy: That is all.

Testimony of Albert William Theobald, Leslie Kingdon Sweet, Robert Hutchings Whittall, Noel Ryder Jenkins, George Christopher Bedwell and Harold Halton Mummery, Witnesses on Behalf of Respondent Underwriters, Taken by Commission to London. 1663

Respondent Underwriters' Exhibit 2.

First Interrogatory: State your full name, age, residence address, and your occupation or profession.

Answer of Albert William Theobald: My name is Albert William Theobald, I am 49 years of age, I reside at Woodrow Farm, Wigginton, Tring, Hertfordshire, England and 1664
I am a marine underwriter.

Answer of Leslie Kingdon Sweet: My name is Leslie Kingdon Sweet, I am 47 years of age, I reside at Sefton, Vincent Close, Esher, Surrey, England, and my profession is marine insurance.

Answer of Robert Hutchings Whittall: My name is Robert Hutchings Whittall, my age is 57 years, I reside at Flat 27, 7 Princes Gate, London, S. W. 7., England and I am a Deputy Underwriter.

Answer of Noel Ryder Jenkins: My name is Noel Ryder Jenkins, my age is 55 years, I reside at Mowbray, Bickley, Kent, England, and I am now retired.

1665

Answer of George Christopher Bedwell: My name is George Christopher Bedwell, my age is 54 years, I reside at 35 Bethune Avenue, London, N. 11., England, and I am an adjuster of claims.

Answer of Harold Halton Mummery: My name is Harold Halton Mummery, my age is 57 years, I reside at 73, North Gate, Regents Park, London, N. W. 8., England, and I am an underwriter.

Second Interrogatory: State what your profession was in February, 1942, and how long prior to that time you had been engaged in that profession, and what your experience had been therein.

1666 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

Answers:

Theobald: In February 1942 I was a marine underwriter and I had been engaged in marine underwriting for the previous ten years. I had been in the underwriting room of the London Assurance, one of the largest British marine companies operating in the market, for over 20 years.

Sweet: In 1942 I was deputy underwriter. I started my career in marine insurance in 1920 and I was continuously engaged in it all the time. I have been deputy under-
1667 writer of the Phoenix Groups of Companies since 1st January, 1934, and during the war I did practically all the underwriting because the underwriter of my Company was a Director of the Government War Risks Insurance Office as from the outbreak of the war.

Whittall: In 1942 I was deputy underwriter to Arthur James Whittall, underwriter for Lloyds Syndicate. Prior to the war, I had been with the Union Insurance Society of Canton Limited from the 1st October 1910 until July 1939. During that period I was in charge of several of their important branches in India, Malaya and China and, as the Branch Manager, had to undertake insurance underwriting for the Society. On the 1st November, 1939, I joined the
1668 staff of A. J. Whittall's syndicate at Lloyds.

Jenkins: In 1942 I was a marine underwriter to the Royal Exchange & Assurance Corporation, joint marine underwriter at the Sun Insurance Office and the Planet Assurance Company and joint London marine underwriter for Elders Insurance Company. I commenced marine insurance in 1913 and about 1925 became deputy underwriter to the Sun Insurance Office and was there from 1925 to 1938. The appointments first mentioned took place on the 25th March, 1938.

Bedwell: I was an adjuster of claims to the Union Marine & General Insurance Company, who are the London Agents of the Northern Maritime Insurance Company Limited. I had occupied that position since April 1939 and

1669

for thirteen years previously I had been deputy adjuster of claims with the same companies.

Mummery: Underwriter and Manager, Marine Department of the London Insurance, underwriter to the British Law Insurance Company and underwriter of the Guildhall Insurance Company Limited. I was appointed underwriter in December 1937 and in the marine insurance business since 1908.

THIRD INTERROGATORY: If in response to the foregoing interrogatories you have stated that you were a marine insurance underwriter or otherwise engaged in the marine insurance business, state whether, and, if so, to what extent, you have underwritten war risks on vessels, cargoes or both, and fixed premium rates therefor, and on what minimum number of occasions you have done so.

1670

Answers:

Theobald: Throughout the whole of the war I was regularly engaged in fixing rates of war risks, certainly with a minimum of 50 or 60 per day, on both cargoes and vessels.

Sweet: I should say it runs into many hundreds and probably thousands of risks.

1671

Whittall: It is impossible to estimate the number of occasions but during the war, as is well known, the bombing was considerable and very often Mr. A. J. Whittall was unable to reach the City, on which occasions the entire underwriting was done by myself, and during those periods I must have written a considerable number of war risk insurances going into several hundreds.

Jenkins: I have written war risks on vessels, and cargoes, and fixed premiums on thousands of occasions.

Bedwell: No. As I am not an underwriter, I am unable to answer that question. I have never underwritten a war risk on vessels or had anything to do with underwriting.

Mummery: I have done a considerable volume of war risk insurance, both hull and cargo, and particularly on the

1672 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

cargo side as a member of the War Rating Committee. There have been many thousands of occasions.

FOURTH INTERROGATORY: If in response to the foregoing interrogatories you have stated that you were a marine underwriter for any insurance company or for any syndicate in Lloyd's which insured against hull war risks, state the names of the company or the group or groups in Lloyd's for whom you acted as underwriter at any time in 1941 or 1942 and between what dates you so acted.

1673 Answers:

Theobald: I was engaged in underwriting for the London Assurance during 1941 and 1942.

Sweet: I acted as deputy underwriter for the Phoenix Assurance Company Limited, the Union Marine and General Insurance Company Limited, the London Guarantee and Accident Company Limited and for the London Agency of the Northern Maritime Insurance Company Limited. I acted as such during the years 1941 and 1942.

Whittall: I was underwriting during the full years 1941 and 1942. In 1942, following a reorganization of Groups, I was underwriting for Groups Nos. 448, 449 and 621.

1674 I mentioned those only to pinpoint the numbers of the Groups in 1942 following the reorganization, but it follows that I was deputy underwriter during the two years mentioned.

Jenkins: The Companies were those I have mentioned in the First Interrogatory. I was with them for the whole of the two years mentioned. Also, there were subsidiary companies of theirs. War risk lines on American risks were usually accepted in the name of the National Provincial Insurance Company. There was a period when your Ambassador was here and there was a great deal of nervousness as to whether the transfer of funds from here to America to meet losses might be interrupted and, to meet that danger, we, the Companies, created a trust fund in America of $10,000,000.00. That was all done in the names

1675

of Companies who were not doing business in America. The National Provincial Insurance Company was used for that purpose and that purpose only. Actually, it is the Sun Insurance Office and the Royal Exchange.

Bedwell: This does not apply.

Mummery: For the aforementioned companies named in answer to Interrogatory No. 1 and I acted for them during the whole of the years 1941 and 1942.

FIFTH INTERROGATORY: If you know who was underwriter on hull war risks for the Edinburgh Assurance Co., Ltd. in 1941, please state his full name and (if you know) whether he is still alive. 1676

Answers:

Theobald: The underwriter for the Edinburgh Assurance Company Limited was Mr. A. L. Kennedy and he is not still alive.

Sweet: His name was Mr. A. L. Kennedy and he is dead.

Whittall: I do not know.

Jenkins: His name was Mr. A. L. Kennedy. He is not alive, but he was the underwriter for war risks for the Edinburgh Assurance Company in 1941 and 1942.

Bedwell: I think it was Mr. A. L. Kennedy. I could not say that definitely because I cannot fix the time definitely enough. His death was reported shortly after that time. 1677

Mummery: An old personal friend, A. L. Kennedy and, to the best of my knowledge and belief, he died in 1942.

SIXTH INTERROGATORY: Did you have anything to do with war risk "Hull" insurance on the S/S "*Portmar*" "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports" in or about the month of November, 1941, and, if yea, state what you did and what your connection was with that insurance and with any policy or policies evidencing that insurance.

1678 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

Answers:

Theobald: Yes. I accepted a line of $20,000.00 on the hull of this vessel for the round voyage U. S. Pacific Philippine return to U. S. at a rate of 1½ per cent. This risk was accepted by me through the London Brokers, Messrs. Thomas Stephens & Sons, Limited.

Sweet: I wrote a line of $30,000.00 on the S/S *"Portmar"* for the voyage mentioned. I think it was the end of November 1941, but I am not sure of the exact date. That
1679 was against war risks only. The policy was subseqently issued on our behalf. I had no connection with the policy.

Whittall: Yes. I wrote a line of $30,000.00 for the three Syndicates concerned.

Jenkins: Yes. As an underwriter I accepted a part interest in the war risk insurance on the hull of the S/S *Portmar* for one round voyage to the Philippines and Pacific Coast and back.

Bedwell: No, I did not.

Mummery: I underwrote a line of $16,000.00 on the risk in the name of the British Law Insurance Company.

Seventh Interrogatory: Did you know in general what
1680 war risks other underwriters at Lloyd's and other British insurance companies were accepting in 1941 and 1942, and what premiums were charged on those insurances? If yes, state the facts.

Answers:

Theobald: I naturally saw regularly the risks written by other underwriters because they only, in general, accepted a proportion of the risk and I shared in these risks. The premiums are on the slip and sometimes I might not have thought the rate was sufficient, when I declined to participate. In other cases, where I considered the rate was the correct one for the risk involved, I accepted a line. The premiums naturally varied with the voyages involved and were also greatly governed by the news available to us at the time the risk was placed.

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Sweet: Yes. I saw several hundred risks, probably thousands, some of which I underwrote and others which I did not write, although they had been written by other underwriters. Naturally, there were quite a lot of risks I did not see. There were all sorts of rates charged. The rate depended entirely on the hazard involved, the area in which the vessel was trading, the nationality of the vessel and other factors affecting the risk at the time the risks were presented.

Whittall: One naturally had a good idea as one saw a vast number of slips which other underwriters had written lines on as well as ourselves. The details of the premiums and the risks concerned were always shown on the slip. It is difficult to remember at this date what sort of rates were being charged. They varied according to the voyages concerned.

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Jenkins: I cannot give you an unequivocal "Yes" because I did not know what they were all doing, but generally speaking, yes. In a market you see the risks going round and you get some idea of what other underwriters are doing. The rates and conditions varied so very greatly and they varied from day to day. I knew the rates at the time; but they were fluctuating from day to day.

1683

Bedwell: No.

Mummery: I have only knowledge of those that were submitted to me for consideration. Each one varied in accordance with the voyage and risk and the time at which it was placed. The premiums varied with the hazards.

EIGHTH INTERROGATORY: State whether you accepted or underwrote any war risk hull insurance in January and February, 1942, on merchant vessels engaged in transporting troops and artillery in any active war area. If yea, state the details of operations and the geographical area covered.

1684 Answers:

Theobald: To the best of my knowledge and belief, I did not insure such risks because they were undertaken by the Government.

Sweet: No.

Whittall: I should say emphatically no for the reason that no information of this nature would have been permitted to be divulged to us by the British Government and, therefore, the risk could not be offered to underwriters
1685 without such information.

Jenkins: No, I did not.

Bedwell: No, I did not.

Mummery: No.

NINTH INTERROGATORY: State whether you accepted or underwrote any war risk hull insurance at any time, on merchant vessels engaged in transporting troops and artillery in any active war area. If so, state the times and the details of operations and geographical areas relating to each such insurance.

Answers:

Theobald: I make the same reply as for Interrogatory
1686 No. 8.

Sweet: To the best of my knowledge, no.

Whittall: Again emphatically no for the foregoing reason.

Jenkins: No.

Bedwell: No, I did not.

Mummery: To the best of my knowledge and belief, no.

TENTH INTERROGATORY: State whether or not you would have accepted or underwritten any war risk hull insurance in January and February 1942, on merchant vessels engaged in transporting troops and artillery in an active war area, if application had been made to you for such insurance.

1687

Answers:

Theobald: I think it very unlikely I should have accepted such an insurance because, owing to secrecy, I should not have had made available to me sufficient information to fix a rate for such a risk.

Sweet: Probably not.

Whittall: I consider it impossible to say what might have happened in a hypothetical case of this nature, but I think it very unlikely unless the operation concerned was to a very inactive war area.

1688

Jenkins: I would not have done so.

Bedwell: No, as I am not an underwriter.

Mummery: No.

ELEVENTH INTERROGATORY: State, if you know, whether in January and February 1942, war risks hull insurance on merchant vessels engaged in transporting troops and artillery in an active war area was accepted or underwritten at Lloyd's or elsewhere in the London insurance market. If so, please state the facts as fully as you can, including the market rates charged for such insurance.

Answers:

Theobald: I should think not.

1689

Sweet: I have never heard of any such risk being offered or placed.

Whittall: I should say definitely not because no such information would have been divulged by the Government, being a war secret.

Jenkins: I would say No.

Bedwell: I do not know.

Mummery: To the best of my knowledge and belief, no. I do not think such business would be offered because of censorship.

TWELFTH INTERROGATORY: Assume that an American merchant vessel bound from the United States to ports in the Philippines, in December 1941, had, because of the Japanese

1690 attacks in December 1941, changed her course and had proceeded to the Fiji Island and thence to Sydney, Australia, and had then under military or naval instructions of either or both the United States and/or Australia proceeded along the east coast of Australia and to Port Darwin and Wyndham,

a—Would you or would you not have accepted or underwritten war risk hull insurance on such a voyage in January or February 1942?

1691 b—Did you accept or underwrite war risk hull insurance at that time for such a voyage or voyages?

c—If yes, what were the conditions of such insurance, and what was the rate of premium charged?

Answers:

Théobald: (a) I think it very unlikely I should have done so. (b) No. (c) This does not apply.

Sweet: (a) Yes.

(b) Not for such a voyage, to the best of my knowledge.

(c) This does not apply.

Whittall: (a) It is probable we might have accepted
1692 hull insurance to ports in Australasia.

(b) It is impossible to say with any certainty. At that time we might have accepted a risk, as stated above, to and between ports in Australia.

(c) At this date I cannot recall what the rates or conditions were.

Jenkins: (a) Yes, for a normal trading voyage.

(b) I have no specific recollection of so doing, but it is quite likely that such risks might have been accepted on behalf of my company.

(c) So far as we are concerned, it would only have been cargoes and it would have been marine and war risks insurance together. The rates varied from day to day.

Bedwell: (a) This does not apply because I am not an underwriter.

(b) This does not apply as I am not an underwriter.

(c) This does not apply as I am not an underwriter.

Mummery: (a) If I had knowledge of the facts related in this interrogatory at the time the risk was submitted, I would not have accepted a line.

(b) No.

(c) This does not apply. 1694

THIRTEENTH INTERROGATORY: Assume that an American merchant vessel in February, 1942, was making or intended to make a voyage between northern Australia and the Island of Timor, carrying ammunition and troops at a time when it was known to be an active war area,

a—Would you or would you not have accepted or underwritten war risk hull insurance on such a voyage?

b—Did you accept or underwriter war risk hull insurance on any such voyage?

c—If yes, what were the conditions of such insurance, 1695 and what were the rates of premium charged?

d—If you were required to fix a reasonable rate of premium for such a voyage in January or February 1942, what would that rate have been?

Answers:

Theobald: (a) Most definitely no.

(b) Definitely no.

(c) This does not apply.

(d) I cannot say.

Sweet: (a) No. I should have said such a risk was practically uninsurable.

1696 (b) No.

(c) This does not apply.

(d) I cannot say.

Whittall: (a) This, of course, is a purely hypothetical case as, for the reasons already stated above of secrecy, no such risk would be likely to be offered to us. But, if such had been offered, I would not say emphatically we might not have accepted a small line at a very high premium.

1697 (b) No.

(c) This does not apply.

(d) If the military authorities had disclosed to us the full hazards of the situation, the premium in a case like this, if we did accept a small line, would be the equivalent of what is termed an overdue rate, and to my mind it would have been in the neighbourhood of 63 per cent at the very minimum.

Jenkins: (a) No.

(b) No.

1698 (c) This does not apply.

(d) 100 per cent, because I would not have touched it in any case.

Bedwell: (a) This does not apply because I am not an underwriter.

(b) This does not apply because I am not an underwriter.

(c) This does not apply because I am not an underwriter.

(d) This does not apply because I am not an underwriter.

Mummery: (a) No.

1699

(b) No.

(c) This does not apply.

(d) I say that no-one could require me to fix a rate. I would say it would be an even chance, which would be 100 per cent, but that is not the reply I would like to give.

In answering the following interrogatories numbered Fourteenth to Twenty-first inclusive, will you please assume all the following statements lettered A to F, to be true:

1700

A. Assume that the SS. *"Portmar"* was a registered United States, single-screw, ocean cargo steamship of approximately 8,600 tons deadweight, built in 1919, classed 100 A-1 with Lloyd's Register of Shipping, and owned by Calmar Steamship Corporation.

B. Assume that the SS. *"Portmar"* sailed from San Francisco on or about November 28, 1941, bound for Manila in the Philippine Islands; that the Japanese Government declared war on the United States on December 7, 1941 and thereupon invaded the Philippine Islands; that on December 11, 1941, the SS. *"Portmar"* ceased following the voyage to Manila and proceeded to the Fiji Islands, thence to Sydney, Australia, thence to Port Darwin, and thence to Wyndham, Australia;

1701

C. Assume that after all the outbound cargo of the SS. *"Portmar"* had been discharged at Wyndham, Australia on or about February 10, 1942, the vessel returned to Port Darwin without any cargo, arriving there on or about February 12, 1942 and that she went to berth there on or about February 13, 1942;

D. Assume that the SS. *"Portmar"* was there loaded with stores, military equipment, ammunition, 75 calibre field guns, and between 300 and 400 officers and men of the

1702 United States Field Artillery, all to be sent to Koepang on Timor Island;

E. Assume that the Commander of the United States Navy Cruiser *"Houston"* stated to the Master of the S/S *"Portmar"* that it would be a hot place, that the Cruiser *"Houston"* would not even dare to escort the *"Portmar"* into the harbor, that the Cruiser would accompany the *"Portmar"* to the entrance and said "then, gentlemen, I
1703 am sorry to say I got to get out, you got to get in and do the best you can";

F. Assume that the Master of the *"Portmar"* had heard that an Empire Airways flying boat had been destroyed by enemy action enroute from Darwin to Koepang on January 29, 1942; and that it was common knowledge on February 14, 1942, at Port Darwin, that the port of Koepang had already been bombed by Japanese war planes.

FOURTEENTH INTERROGATORY: State whether or not you accepted or underwrote any war risk hull insurance on such
1704 a voyage as is described in the foregoing assumptions designated by the letters D to F, inclusive:

Answers:

Theobald: No.

Sweet: No.

Whittall: Naturally we underwrote a line on the S/S *"Portmar"* for her original voyage, as indicated, to the Philippine Islands. She was then diverted with her cargo to Australia where it was unloaded, where, to my mind, the venture ceased. As regards the latter part of the voyage when she was taken under military control, a risk of this nature had never been to my knowledge offered on the market and, with the full information given in this assumption to which I am replying, I consider my previous rate of 63 per cent on the low side.

Jenkins: I did not. It is not a commercial venture and we were insuring commercial ventures.

Bedwell: I am not an underwriter and would not accept it.

Mummery: No.

FIFTEENTH INTERROGATORY: State, if you know, whether war risk hull insurance on a voyage, such as is described in the assumptions designated D to F, inclusive, was written at Lloyd's or elsewhere in the London market.

Answers: 1706

Theobald: I have no knowledge of any such risk.

Sweet: Not to the best of my knowledge.

Whittall: Not to my knowledge.

Jenkins: No.

Bedwell: I do not know. I am not an underwriter.

Mummery: To the best of my knowledge and belief, no.

SIXTEENTH INTERROGATORY: Referring to the assumptions designated by the letters D to F, inclusive, answer by "yes" or "no" whether you are able to state with reasonable certainty what a reasonable rate of premium would be for war risk hull insurance on such a voyage on the S/S "*Portmar*" in February, 1942. 1707

Answers:

Theobald: I cannot say.

Sweet: No.

Whittall: Yes.

Jenkins: Yes.

Bedwell: I do not know.

Mummery: No, except that I cannot imagine it to be less than 100 per cent.

SEVENTEENTH INTERROGATORY: If your answer to the Sixteenth Interrogatory is "yes", please state the amount or rate of such fair and reasonable premium.

Answers:

Theobald: This does not apply.

Sweet: This does not apply.

Whittall: I think on the information in the assumption, the rate would be at least 70 per cent.

Jenkins: 100 per cent.

Bedwell: I have no idea. I am not an underwriter.

Mummery: I refer to my answer to interrogatory No. 16.

EIGHTEENTH INTERROGATORY: Please state the basis and reasons for your opinion of the fair and reasonable rate of premium stated in your answer to the seventeenth interrogatory.

1709 Answers:

Theobald: This does not apply.

Sweet: This does not apply.

Whittall: In view of the statement made by the Captain of the "*Houston*", the risk was a very considerable one. The chance of bombing seemed fairly certain, but the risk that had to be estimated was whether she would be sunk or merely damaged and, if so, the probable extent of the damage which would call, in my opinion, for a very high rate.

Jenkins: Having regard to the risk, I should want a premium which would bring the amount received to a total

1710 of 100 per cent.

Bedwell: This does not apply.

Mummery: In the light of what I am asked to assume in D to F, I feel the hazards were such that there was little chance of the S/S "*Portmar*" escaping damage or capture.

NINETEENTH INTERROGATORY: Assuming the truth of all the assumptions lettered A to F inclusive set forth immediately preceding the Fourteenth Interrogatory; and further assuming:

G. That on her departure from San Francisco on November 28, 1941, the SS. "*Portmar*" was insured under several hull policies aggregating $860,000, each numbered D41/11356 insuring her against war risks on a voyage:

1711

"At and from a United States Pacific Port, to port or ports in the Philippine Islands, whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal), via port or ports, any order and for 24 hours after arrival."

H. That it should be held by the Court that the insured voyage described in the foregoing assumption G was not broken up, terminated and abandoned on or prior to February 13, 1942, and the said policies mentioned in Assumption G were not thereby terminated, but that the voyage described in Assumptions D to F inclusive, constituted merely a deviation or change of voyage and continued to be covered by said policies numbered D41/11356; and

1712

J. That said policies numbered D41/11356 each included the clause:

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these insurers when such facts are known to the assured and/or their managers and an additional premium paid if required."

1713

Please answer by "yes" or "no" whether you are able to state, with reasonable certainty, such fair and reasonable additional premium for a voyage or voyages in waters north of Australia between Port Darwin and Koepang, described in the foregoing assumptions D to F, inclusive.

Answers:

Theobald: No.
Sweet: Yes.
Whittall: Yes.
Jenkins: Yes.
Bedwell: I do not know.
Mummery: Yes.

1714 *Testimony of Witnesses on Behalf of Respondent Underwriters—Direct.*

TWENTIETH INTERROGATORY: If your answer to the Nineteenth Interrogatory is "yes", please state the amount or the rate of such fair and reasonable additional premium.

Answers:

Theobald: This does not apply.

Sweet: 75 per cent.

Whittall: My opinion of the additional premium due has already been given in a previous answer.

Jenkins: Sufficient to bring the total premium up to
1715 100 per cent.

Bedwell: This does not apply.

Mummery: The additional premium I would require for the risks already mentioned is the balance of premium which would give me 100 per cent.

TWENTY-FIRST INTERROGATORY: Please state the basis and reasons for your opinion as to the amount or the rate of such fair and reasonable additional premium.

Answers:

Theobald: This does not apply.

Sweet: My reason for such a rate is that the risk was practically uninsurable. It would be a gamble. It is not a
1716 rate which I should imagine any shipowner would accept, unless he had to insure it. The hazard was such that I should say there was a rather slender chance of her coming through and, therefore, you would have to have a very high rate.

Whittall: The basis is as I have given already.

Jenkins: Because I do not consider that the venture was an insurable risk.

Bedwell: This does not apply.

Mummery: Because of the hazards involved.

TWENTY-SECOND INTERROGATORY: Please state the nature and extent of your personal interest in the outcome of the present litigation.

Answers:

Theobald: I have none.

1717

Sweet: None.

Whittall: I have no personal interest in it whatsoever.

Jenkins: None.

Bedwell: I have no financial interest in the outcome of the litigation. There might be a personal one in that I would like the attitude I have adopted towards the question supported. We do not turn down claims lightly, and the reasons we give, we hope, are sound. I would personally like to think the Court would uphold that I have not been wrong in the attitude I have taken.

1718

Mummery. I personally could not care less, but my company, of course, is interested.

Cross-Interrogatories.

First Cross-Interrogatory: Were you aware in November 1941, and are you now aware, of all the risks undertaken by Underwriters at Lloyd's, Institute of London Underwriters or by the Excess Insurance Co. Limited?

Answers:

Theobald: No.

Sweet: No.

1719

Whittall: Certainly not.

Jenkins: No.

Bedwell: No, I was not.

Mummery: Definitely no.

Second Cross-Interrogatory: Do the Underwriters at Lloyd's fix the premium on a risk, or do such Underwriters accept their proportion of risk in accordance with the terms stated on a slip on which someone else has fixed the premium?

Answers:

Theobald: The Underwriters themselves fix the premium.

Sweet: When a broker has a risk to place, he goes to the Underwriters who are recognized leaders on the type-

of risk concerned and he then quotes his client a rate at which he thinks he can probably complete the risk. On receiving an order to place the business, he proceeds to show the risk to underwriters, both Lloyd's and companies, who either write or decline the risk, according to their estimation of the rate being paid. It is the Underwriters who fix the premium and they accept or decline the risk in accordance with their estimation of the rate paid. Sometimes two or three rates have to be paid to cover the risk.

1721 I have known cases. You might get cases where Underwriters will write a risk at 5 per cent but where the broker has had to pay as much as 20 per cent to complete the risk according to the hazards involved.

Whittall: If the "someone else" is meant to mean a non-underwriter, the answer is emphatically no. Underwriters, of course, fix all rates and nobody who is not an underwriter would be permitted to take any part in rating.

Jenkins: The rate is fixed by the underwriter. Other underwriters may accept a share of the risk at the same rate as is fixed by the leading underwriter, or they may decline that risk and demand a higher rate. I am trying

1722 to point out that I have known this not only from the underwriting side, but from the point of view of having been a broker too in the 1914/1918 war. There were occasions when, in getting a war risk covered, the risk was started at 5 per cent and then, in order to complete it, as much as 20 per cent was paid, with varying rates in between, 5 per cent, 8 per cent, 10 per cent, 15 per cent and 20 per cent, all on the same risk. One man might say: "I think that is worth 5 per cent" and another man would say: "Well, I would not write under 10 per cent." It becomes a question of bargaining and as to how much the broker can cover. If he starts with one underwriter at 5 per cent and he has $1,000,000.00 to do, he may only do $250,000.00 at 5 per cent and he may do another $250,000.00 at 8 per cent, and then 10 per cent on another $100,000.00, and so on. It depends on the risk he has to cover.

1723

Bedwell: I do not know.

Mummery: Each underwriter is entitled to fix his own rate on the risk.

THIRD CROSS-INTERROGATORY: Are you personally interested in the outcome of this suit?

Answers:

Theobald: No.

Sweet: No.

Whittall: No.

Jenkins: No.

1724

Bedwell: Yes, as I have already stated in answer to Interrogatory No. 22.

Mummery: I have no personal interest at all.

FOURTH CROSS-INTERROGATORY: If judgment is rendered in this suit against Sydney Keith Scott et al., will you be called upon to bear or pay a certain proportion of the amount recovered by Calmar Steamship Corporation in respect of the *Portmar* under the policies here involved and referred to in Sub-divisions G and J of the Nineteenth Interrogatory?

Answers:

Theobald: Personally, no, but my company will. 1725

Sweet: My company will but I shall not.

Whittall: I personally shall not, but the Syndicates for whom I underwrote the line will be called upon.

Jenkins: Personally, I should not be called upon to pay anything, but, on the other hand, my Companies would. That would probably be the National Provincial Insurance Company, which is the Sun Insurance Office and the Royal Exchange, the Companies which underwrote the risk. I take it this is a case where, as is usually done, it has been agreed by the parties that if a case goes to Court, one underwriter is put up as the defendant and all the other underwriters will follow his fortune. If that is so, then my Companies would follow the fortune of the case and

1726 *Testimony of Witnesses on Behalf of Respondent Underwriters—Cross.*

follow the result against Mr. Sydney Keith Scott. To me personally, it would not make any difference.

Bedwell: No.

Mummery: Presumably the British Law Insurance Company would.

Fifth Cross Interrogatory: If you are, or in November 1941 were, a Lloyd's underwriter, what was the number of the syndicate of which you were a member?

Answers:

1727 *Theobald:* I was not a Lloyd's underwriter.

Sweet: I was not.

Whittall: I was not a member in 1941.

Jenkins: I was not a Lloyd's underwriter and I am not now.

Bedwell: I am not an underwriter and never have been.

Mummery: I was not a Lloyd's underwriter in November 1941.

Sixth Cross Interrogatory: Are you an officer or employee of any of the following:

Edinburgh Assurance Co. Ltd.
1728 Northern Maritime Insurance Co. Ltd.
Fine Art & General Insurance Co. Ltd.
British Law and Insurance Co. Ltd.
Planet Assurance Co. Ltd.
Elders Insurance Co. Ltd.
National Provincial Insurance Co. Ltd.
Excess Insurance Company Limited

Answers:

Theobald: I am an officer of the Fine Art & General Insurance Company Limited.

Sweet: Yes, the Northern Maritime Insurance Company Limited in my capacity as deputy underwriter of London agents of the Northern Maritime Insurance Company Limited.

1729

Whittall: No.

Jenkins: Yes, the Planet Assurance Company Limited and Elders Insurance Company. I was not an employee in the employ of the National Provincial Insurance Company, but accepted the risks in their name in my capacity as underwriter of the Royal Exchange.

Bedwell: I am an officer of the Union Marine and General Insurance Company who are the London agents of the Northern Maritime Insurance Company.

Mummery: Yes, the British Law Insurance Company. It is the British Law Insurance Company rather than the British Law and Insurance Company Limited.

1730

SEVENTH CROSS INTERROGATORY: If your answer to the Sixth Cross Interrogatory is negative, were you a stockholder or in any way financially interested in any of these companies in November 1941 or at any date between that date and the present time?

Answers:

Theobald: I was not a stockholder in any of the companies mentioned.

Sweet: No.

Whittall: I hold a few shares in the Planet Assurance Company, but I cannot remember, without referring to my books, on what date I bought them. From memory, I should say I bought them after 1941.

1731

Jenkins: Yes. I have a small shareholding in the Planet Assurance Company Limited.

Bedwell: No.

Mummery: No.

EIGHTH CROSS INTERROGATORY: Are you now financially interested in any of the companies mentioned in the Sixth Cross Interrogatory?

Answers:

Theobald: I have no financial interest in any of the companies mentioned.

1732 *Testimony of Witnesses on Behalf of Respondent Underwriters—Cross.*

Sweet: I am not interested financially in the Company as I have no shareholding in it at all, but as an employee, I presume I am financially interested.

Whittall: Only as a shareholder in the Planet Assurance Company Limited.

Jenkins: Only through that shareholding in the Planet Assurance Company Limited, which is very small.

Bedwell: No.

Mummery: I have no financial interest other than being
1733 an officer of the British Law Insurance Company.

NINTH CROSS INTERROGATORY: Was a slip describing the risk on the *Portmar* as "U. S. Pacific—Philippines and return to U. S. Pacific and/or U. S. Atlantic and 15 days . . ." submitted to you in November or December 1941?

Answers:

Theobald: Yes.

Sweet: Yes.

Whittall: Yes.

Jenkins: Yes.

Bedwell: No.

Mummery: No. It was submitted to my deputy, Mr.
1734 C. W. Bazell, who underwrote a line in the name of the British Law Insurance Company.

TENTH CROSS INTERROGATORY: Please examine the paper annexed to these cross interrogatories as Schedule A,* and state whether that paper is a true copy of the "Slip" which was submitted to you with reference to the *Portmar* in November or December 1941.

Answers:

Theobald: Yes.

Sweet: I do not remember what was on the slip now, but it appears to contain the particulars of the risk I wrote. I think there must be a typographical error in the phrase

* Schedule A, the "Slip", dated November 26, 1941, is printed as part of Libelant's Exhibit 4, fols. ..... to .....

1735

"Institute or American clauses drs. pay tax". It seems to me that it should have been "urs" meaning "underwriters pay tax".

Whittall: Yes, to the best of my recollection.

Jenkins: I do not know whether it is a copy or not, but I am prepared to assume it is a copy.

Bedwell: This does not apply.

Mummary: The details of the slip that I have had the opportunity of examining are in accordance with the records in my own office.

1736

1737

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Vol. II

(Pages 580 to 822)

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1952

No. 262

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

UNITED STATES OF AMERICA

No. 303

CALMAR STEAMSHIP CORPORATION,
PETITIONER,

vs.

SYDNEY KEITH SCOTT, ONE OF THE LLOYDS UNDERWRITERS, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

NO. 262—PETITION FOR CERTIORARI FILED AUGUST 7, 1952
NO. 303—PETITION FOR CERTIORARI FILED AUGUST 28, 1952
CERTIORARI GRANTED OCTOBER 20, 1952

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16. Cable: Calmar to Michelson, dated March 27, 1942	147	605
17. Cable: Malleson, Stewart to Calmar, dated March 30, 1942	147	605

* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

	Admitted at Page	Printed at Page
18. Letter: J. C. Outler, W. S. A., U. S. M. C. to Mr. H. W. Warley of Calmar, dated April 3, 1942	148	606
19. Cable: Calmar to Malleson, Stewart, dated April 7, 1942	148	607
20. Consisting of twenty cables and one letter	150	607
21. Letter: William Radmer, General Counsel, W. S. A., to Calmar, dated October 24, 1942	150	622
22. Telegram: W. C. Peet, Jr., to Calmar, dated November 12, 1942, as to requisition of title to SS. *Portmar*	151	624
23. Certificate of requisition of title to possession of SS. *Portmar* by the United States War Shipping Administrator at Brisbane, Queensland, Australia, dated November 17, 1942, signed by H. A. Rettig for U. S. W. S. A.	151	625
24. Computation of charter hire of SS. *Portmar* from February 19, 1942 to November 17, 1942	153	*
25. List of expenses paid by Calmar Steamship Corporation	154	*
25A. Amended list of expenses paid by Calmar with allocation of items chargeable to hull underwriters, respondents in Ad. 133-332	168	626
26. Deposition of Axel Michelson, Master of SS. *Portmar*, taken at New York, N. Y. on July 31, 1945	170	267
27. Profile plan of SS. *Portmar*	170	*

* These Exhibits will be handed up to the Court in a Separate Volume.

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28.	Axel Michelson's Marine Note of Protest on January 22, 1942	170	†
29.	Chart of harbor of Port Darwin with marks made by Captain Michelson	170	*
30.	Receipt dated February 21, 1942, given to Captain Michelson for secret codes by Australian Naval Authorities	171	*
31.	Memorandum: Frank LaRue, Lt. Col., Inf., to Captain Michelson, dated February 26, 1942	171	628
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia	171	†
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A.B., before United States Vice Consul at Melbourne, dated March 25, 1942	171	*
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	†
35.	Captain Michelson's Extended Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia	171	*
36.	Deck log book of SS. *Portmar*, November 20, 1941, to January 20, 1942, inclusive	171	†

* These Exhibits will be handed up to the Court in a Separate Volume.

† Omitted pursuant to Stipulation printed at page 785.

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37. Deck log book of SS. *Portmar*, January 21, 1942, to February 19, 1942, inclusive	172	†
38. Pages of Official Log of SS. *Portmar*, February 15, 1942, to February 19, 1942, inclusive	172	†
39. Letter: Axel Michelson to Captain Douglas Taylor, dated August 1, 1942.	172	629
40. Letter: R. Douglas Taylor to Captain Axel Michelson, dated August 4, 1942	172	631
41. Memorandum: Colonel T. J. Plant of July 27, 1942 with notation by Colonel Grimm	172	632
42. Letter: J. P. Williams to Captain Michelson, dated August 13, 1942	172	633
43. Letter: H. F. E. Whitlam, Crown Solicitor, Commonwealth of Australia to Malleson, Stewart & Co., dated August 19, 1942	173	634
44. Letter: Axel Michelson to Malleson, Stewart & Co., dated August 14, 1942	173	635
45. Letter: Axel Michelson to Malleson, Stewart & Co., dated August 15, 1942, with postscripts dated August 15, 1942 and August 17, 1942	173	636
46. Report of preliminary survey of the *Portmar* by Lieut. Commander Horne	173	641
47. Report of survey of the *Portmar* by R. Douglas Taylor and A. G. Horne at Brisbane, dated September 19, 1942	174	642

† Omitted pursuant to Stipulation printed at page 785.

	Admitted at Page	Printed at Page
48. Captain Michelson's account of disbursements with vouchers annexed	174	
49. Report of joint survey of the *Portmar* at Sydney, dated February 15, 1943	174	650
50. Deposition of Joseph E. Bullock, Chief Officer of SS. *Portmar* taken at New York, N. Y., on August 2, 1945	175	449
51. Extracts from testimony of Axel Michelson, Master of SS. *Portmar*, in the action in the United States Court of Claims between Calmar Steamship Corporation, plaintiff, against United States of America, defendant, No. 48509, taken at New York, N. Y., on December 5-7, 1950	176	513
52. List of positions to be followed under Naval Orders received by Axel Michelson, Master of SS. *Portmar*, at commencement of voyage	177	655
53. Chart showing proposed voyage according to Naval Orders, and actual route taken by SS. *Portmar*	179	
54. American Syndicate Schedule of War Risk rates, effective February 15, 1942	265	

UNITED STATES OF AMERICA EXHIBITS.

A Authenticated copy of Naval Routing Instructions issued to Master of SS. *Portmar*, dated November 25, 1941	180	657
B Authenticated copy of Naval Radio Dispatch to all merchant ships, dated December 7, 1941	180	661

* These Exhibits will be handed up to the Court in a Separate Volume.

		Admitted at Page	Printed at Page
C	Authenticated copy of Naval Radio Dispatch to *Portmar* to proceed to Suva, dated December 11, 1941	180	661
D	Certified duplicate original of Casualty Report dated March 26, 1943, filed by *Portmar's* Master with United States Coast Guard	180	662
E	Certified copy of Casualty Report, dated July 6, 1942, filed by President of Calmar Steamship Corporation	181	666
F	Mr. C. B. Yule's estimate, dated October 26, 1950, of cost of repairs in the United States, to put the SS. *Portmar* back in class, made from his examination of libelant's Exhibit 47	215	

RESPONDENT UNDERWRITERS' EXHIBITS.

1.	Deposition of Roy J. M. Merrett taken *de bene esse* in New York, July 26, 1949	225	541
2.	Depositions of Albert William Theobald, Leslie Kingdon Sweet, Robert Hutchings Whittall, Noel R. Jenkins, George Christopher Bedwell, and Harold H. Mummery, Underwriters in the London Market, taken under Commission to London	226	555
3.	Letter from D. C. Anderson, Underwriter of American Marine Insurance Syndicates to the Policy Form Committee of the Syndicates, dated January 12, 1940, requesting approval of a redrafted Free of British Capture Hull Clause	231	671

* These Exhibits will be handed up to the Court in a Separate Volume.

	Admitted at Page	Printed at Page
4. Certified copy of extract from minutes of meeting of the Board of Managers of American Marine Insurance Syndicates held January 18, 1940, accepting report of the Policy Form Committee and approving the form of the above clause	233	673
5. Circular letter of American Institute of Marine Underwriters to all members, dated July 18, 1940, enclosing American Institute Free of Capture Clause No. 3 (July, 1940), Form 87A-56	236	
6. Circular letter of American Institute of Marine Underwriters to all members dated September 24, 1940, enclosing American Institute war clauses foreign hulls (September 1940) Form 87A-68	238	680
7. American Institute (October, 1939) Free of British Capture cargo clause Form 87A-47	242	683
8. American Institute (July, 1940) Free of British Capture cargo clause Form 87A-56	243	683
9. Judgment of Starke, J., of the High Court of Australia in Melbourne, Australia, rendered November 19, 1943, in the salvage suits brought by United Salvage Proprietary, Ltd. and Williams against the ship *Portmar*, and by the Australian Salvage Board against Calmar Steamship Corporation	261	684

* These Exhibits will be handed up to the Court in a Separate Volume.

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Judgment (Calmar Steamship Corp. v. Sydney Keith Scott, et al.)	805
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Denial of rehearing	820
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Clerk's certificate (omitted in printing)	821
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1738

Libelant's Exhibit 1.

Name of Vessel	*Portmar*
Official Number	219283
Flag	U. S. A.
Type of Vessel	General Cargo Carrier
Steel or Wood Hull	Steel
	Single Screw
Year Built	1919
Place Built	Portland
1739 Classed	A1—Lloyds
When (Classed)	1919
Propulsive Equipment	Direct
(All Steam)	Recip.
Type of Fuel	Oil
Registered Tonnage—Gross	5,550
" " Net	3,418
Length B. P.	409.8′
Breadth	54.2′
Depth	27.7′
1740 Deadweight (Tons 2240 lbs.)	8,600
Permanent Bunkers (Bbls.)	12,927
Draft on Summer Freeboard	24′-0″
Cargo Capacity—Cu. Ft.	428,116
Speed Knots Fully Loaded	11.0
Fuel Consumption—Bbls.	223

Libelant's Exhibit 2.

1741

AMERICAN BUREAU OF SHIPPING

Certificate No. D. S. 2 R. 148 Port of New York
G. O. No. 10 Sup. No. 2

Date April 25th, 1944.

THIS IS TO CERTIFY THAT the *Portmar*, Official Number 219,283, in conformity with the International Load Line Convention, 1930, has been assigned a Summer Freeboard amidships of 6 feet, 5 inches, which corresponds to a Mean Summer Extreme Draft to the bottom of keel Butt straps 1742
of 24 feet, 0 inches, and THAT, from an examination of the plans and characteristics recorded in this Bureau's files and of the survey reports of all pertinent changes in the Vessel's construction since built (excluding, however, weight added by installation of refrigerated capacity, arming, degaussing, demagnetizing, or the installation of splinter-protection equipment or because of ice-strengthening, or other installation or equipment required by the Administrator, War Shipping Administration, the United States Maritime Commission, the Army, or the Navy), the Vessel's deadweight capacity for cargo, fresh water, stores and Permanent Bunkers in the foregoing condition is 8600 1743
tons (of 2240 pounds).

THIS IS TO CERTIFY FURTHER THAT the Vessel's speed as computed in accordance with General Order No. 10 of the War Shipping Administration is 10.5 knots.

THIS IS TO CERTIFY FURTHER THAT as recorded in this Bureau's files the Vessel has refrigerated space available for cargo of ..... cubic feet.

AMERICAN BUREAU OF SHIPPING

By: J W CANTILLION
Title: Secretary

1744

Libelant's Exhibit 3.

Round voyage charter of SS. *Portmar*. Printed as Exhibit A of Calmar's Libel against United States (pp. 18 to 38).

Libelant's Exhibit 4.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

1745

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's underwriters, and EDINBURGH ASSURANCE CO., LTD. *et al.*,
Respondents.

A. 133-332.

1746

IT IS HEREBY STIPULATED that the documents annexed hereto are true copies of the original documents described below, and may be offered in evidence without further proof, by either party hereto, in lieu of said original documents:

1. Slips binding war risks insurance on SS. *Portmar* with notations as to the amounts subscribed and initialed by or on behalf of the several respondents herein.

2. Cable of January 24, 1942 from Mather Co. to Thomas Stephens Son, initialed by or on behalf of the several respondents herein.

Libelant's Exhibit 4. 1747

3. Letter of April 8, 1942 from Thomas Stephens & Sons, Ltd., to Lloyd's Underwriters on policy No. D41/11356, with notation agreeing to the second paragraph initialed by or on behalf of the several Underwriters, respondents herein.

4. Letter of April 8, 1942 from Thomas Stephens & Sons, Ltd., to the companies on combined policy No. D41/11356, with notation agreeing to the second paragraph initialed by or on behalf of the several companies, except Excess Insurance Co., Ltd., respondents herein. 1748

5. Letter of April 9, 1942 from Excess Insurance Company, Ltd., to Thomas Stephens & Sons, Ltd.

6. Letter of January 8, 1943 from Thomas Stephens & Sons, Ltd., to Messrs. Mather & Company initialed by or on behalf of the several respondents herein.

Dated, New York, New York, November 1, 1950.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant. 1749

MENDES & MOUNT,
Proctors for Respondents.

1750 *Libelant's Exhibit 4.*

1137 D41/11356

U. S.
DOLLAR
A/C

THOS. STEPHENS & SONS, LTD.,

$860,000.

$714,000. L
116,000. Cos.
30,000. E.

1751 "PORTMAR" /S/

U. S. Pacific

Philippines and return to U. S. Pacific and/or U. S. Atlantic and 15 days

via port or ports any order.

$860,000.

HULL AND MACHINERY valued ~~$800,000~~.

1752 Against war, s.r. c.c. and m.d.
~~Inst. or~~ Ameri an Clauses
Undrs. pay tax
N. Y. S. Cl.

1½%

~~less 1/4th% no U. S. Atlantic~~

Slg. on or before 5th December or h/c

GG/EM

26/11/41

(Here follow the initials of Roy J. M. Merrett and most of the Respondent Underwriters with the several amounts of the insurance taken by them respectively.)

Libelant's Exhibit 4.

1753

1138

D41/11356

U. S.
DOLLAR
A/C

THOS. STEPHENS & SONS, LTD.,

$860,000.

Calmar S. S. Corporation

"PORTMAR" /S/ 1754

U. S. Pacific to at and from Philippines and return to U. S. Pacific &/or Atlantic port or ports and 15 days via port or ports in any order.

$860,000.

HULL & MACHINERY valued ~~$800,000~~.

Against war, s.r. & c.c. and m.d. 1755
~~Institute or~~ American Clauses.
N. Y. S. Cl.
Undrs. pay tax

1½%

As main slip.

27/11/41

Sailing 5th Dec. ~~or h/c~~

(Here follow the initials of the remaining Respondent Underwriters with the several amounts of the insurance taken by them respectively.)

1756 *Libelant's Exhibit 4.*

[WESTERN UNION CABLEGRAM]

25 JAN 1942

1942 JAN 24 P 10 27
RECEIVED
26 JAN 1942
Ansd.....

477 PHILADELPHIA PENN 25 24
NLT THOMAS STEPHENS SONS
FIFTYTWO CORNHILL LDN

1757

PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES
[redacted] MATHER CO

PASSED
BY
CENSOR
NO. 2446

642

(Here follow the initials of Roy J. M. Merrett and all other respondent underwriters.)

1758

1759

Libelant's Exhibit 4.

THOS. STEPHENS & SONS, LTD.
Insurance Brokers
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 Lines).

All Communications to Be Addressed to the Firm

1760

London, 8th April 1942

To Underwriters on Policy No. D41/11356,
Lloyd's,
E.C. 3.

Dear Sirs,

Calmar Steamship Corporation. "*Portmar*" s.s.
at Port Darwin, Australia.

We have been instructed by the assured to tender abandonment to you of their interest in the above vessel.

1761

In the event that you decline to accept such abandonment we shall be pleased to hear that you agree to place the insured in the same position as if a writ had been issued.

Agreed

Yours truly,

THOS. STEPHENS & SONS LTD.

H. STEPHENS
Director.

(The word "agreed" in the margin above opposite the second paragraph is in longhand followed by the initials or signatures on said letter and three succeeding pages, of Roy J. M. Merrett and of all the other respondent underwriters on the Lloyd's policy.)

1762 *Libelant's Exhibit 4.*

THOS. STEPHENS & SONS, LTD.
Insurance Brokers
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 Lines).

All Communications to Be Addressed to the Firm

London, 8th April, 1942.

1763 To the Companies on Combined Policy No. D41/11356,
E. C. 3.

Dear Sirs,

CALMAR STEAMSHIP CORPORATION. *"Portmar" s.s.*
AT PORT DARWIN, AUSTRALIA.

We have been instructed by the assured to tender abandonment to you of their interest in the above vessel.

In the event that you decline to accept such abandonment we shall be pleased to hear that you agree to place the insured in the same position as if a writ had been issued.

1764 Yours truly,

THOS. STEPHENS & SONS LTD.

H. STEPHENS
Director.

$30000.	Edinburgh Assurance Co. Ltd.	
30000.	Phoenix Assurance Co. Ltd. Group D	Decline but give benefit of Writ Clause
20000.	Fine Art & General Ins. Co. Ltd.	
16000.	British Law Insurance Co. Ltd.	
4000.	Planet Insurance Co. Ltd.	
2000.	Elders Insurance Co. Ltd.	
14000.	National Provincial Ins. Co. Ltd.	

HW/VW

(The words "Decline but give benefit of Writ Clause" are in longhand, followed by the initials in longhand on behalf of the said seven Institute Companies on the combined Institute Companies policy.)

Libelant's Exhibit 4. 1765

EXCESS INSURANCE COMPANY LIMITED.
40 ~~50-51~~, Lime Street,

Telephone No.
Mansion House 0747.
Telegraphic Address,
"Exmodep, Stock, London."

London, 9th April, 1942.
E. C. 3.

JMB/JMP.

Messrs. Thos. Stephens & Sons, Ltd.,
52, Cornhill,
E. C. 3. 1766

Dear Sirs,

"Portmar" s.s.

We thank you for your letter of the 8th instant giving notice of the Assured's wish to abandon their interest in the above vessel to the various Underwriters and Companies concerned.

This letter is formally to decline such abandonment on behalf of this Company, and at the same time to agree to place the Insured in the same position as if a writ had already been issued. 1767

Yours faithfully,

JOHN M. BALLARDS.
For EXCESS INSURANCE COMPANY LIMITED.

1768 *Libelant's Exhibit 4.*

PER NORTH ATLANTIC AIR SERVICE.
Cl.

Posted 8/1/43. 8th January, 43.

Messrs. Mather & Company,
PHILADELPHIA.

Dear Sirs,

1769 Calmar S/S Corporation.

S/S "*Portmar*".

Hull—War Risk Insurance.

Referring to previous correspondence.

Underwriters inform us that they have given further very careful consideration to this case and have taken legal opinion on the facts, and they now ask us to state their conclusions as follows.

The facts disclose that after arrival in Australia the vessel discharged her outward cargo and thereafter operated under the orders of the military authorities.

1770 It was in the course of these operations, on a series of local voyages to & from Port Darwin, that she became a casualty. These voyages were not even performed as a result of the Owners' decision and quite clearly represented an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia.

Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial

Libelant's Exhibit 4.

1771

for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss.

Speaking for ourselves, we have the greatest sympathy for your friends in the situation in which they are placed but it does seem to us that, on the facts, they should be able to establish the liability of the W. S. A. &/or the Australian Authorities and we earnestly hope that they may succeed in obtaining recognition of this liability without further delay.

1772

Yours truly,

THOS. STEPHENS & SONS, LTD.

Director.

(Here follow the initials of Roy J. M. Merrett and of all the respondent underwriters showing they approved the above letter.)

1773

1774

Libelant's Exhibit 5.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
Libelant,

against

SYDNEY KEITH SCOTT one of the Lloyd's underwriters, and EDINBURGH ASSURANCE CO., LTD. *et al.*
Respondents.

A. 133-332.

1775

IT IS HEREBY STIPULATED that the attached documents may be offered in evidence without further proof by either party.

Dated, New York, New York, November 6, 1950.

KIRLIN, CAMPBELL, HICKOX & KEATING,
Proctors for Libelant.

1776

MENDES & MOUNT,
Proctors for Respondents.

Libelant's Exhibit 5. 1777

THOS. STEPHENS & SONS, LTD.
Insurance Brokers.
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

Directors:
E. R. Turner.
P. S. Stephens.
Harold W. Stephens.
E. G. W. Stephens

Telegrams { Inland "Stephens, Stock, London."
Foreign "Stephens, London."

Telephones: MANsion House 8964 (6 lines).

All Communications to Be Addressed to the Firm

1778

London, 6th February, 1942

W.

Posted 9/2/42.

Messers. Mather & Co.,
226, Walnut Street,
Philadelphia, U. S. A.

RECEIVED
HULL
MAR — 9 1942
DEPT.
MATHER & CO.

Dear Sirs,

Calmar S/S Corporation.
Portmar /S/. Hull War Risk Insurance. 1779

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.

We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director.

HS/OD.

1780 *Libelant's Exhibit 5.*

[Western Union Cablegram]

NEW YORK APRIL 7TH 1942.

NLT

THOMAS STEPHENS SONS.
52 CORNHILL LONDON.

ONE HUNDRED ELEVEN CALMAR STEAMSHIP CORPORATION REQUEST YOU GIVE NOTICE ABANDONMENT THEIR INTEREST IN PORTMAR TO WAR RISK UNDERWRITERS ACCOUNT DESTRUCTION PORTMAR PORT DARWIN AUSTRALIA. STOP PLEASE REPLY PHILA-
1781 DELPHIA.

MATHER LTD.

[Western Union Cablegram]

CDV 387 CABLE=LONDON 13 8 624P

1942 APR 8 PM4 16

LC MATHER CO.
226 WALNUTST PHILA.

PORTMAR TENDERING ABANDONMENT
THOMAS STEPHENS SONS LIMITED.
1782 226.

[Western Union Cablegram]

CDV418 CABLE=LONDON 30 9/ 617P

1942 APR 9 PM5 17

LC MATHER CO.
226 WALNUTST PHILA.

PORTMAR HAVE TENDERED ABANDONMENT TO UNDERWRITERS WHO DECLINE ACCEPT BUT AGREE ASSURED SAME POSITION AS IF WRITS ISSUED EIGHTH APRIL.
THOMAS STEPHENS SONS LIMITED.
226.

Libelant's Exhibit 5. 1783

THE HIGH COURT OF AUSTRALIA
IN ADMIRALTY

No. 24.

BETWEEN:

UNITED SALVAGE PROPRIETARY LIMITED and JOHN PROTHEROE WILLIAMS,

Plaintiffs,

1784

and

THE SHIP *"Portmar"*

Defendant.

THE 19TH DAY OF NOVEMBER 1943

This action having on the 26th, 27th, 28th and 29th days of October 1943 and the 1st and 2nd days of November 1943 been tried before His Honour Mr. Justice Starke and His Honour on the 19th day of November 1943 having awarded the plaintiffs the sum of £5,000 for salvage services rendered by the plaintiffs to the ship *"Portmar"* IT IS THIS DAY ADJUDGED that the plaintiffs recover from Calmar Steamship Corporation the owner of the said ship the sum of £5,000 and costs to be taxed. 1785

J. G. HARDMAN,
Principal Registrar.

(L. S.)

1786 *Libelant's Exhibit 5.*

The above costs have been taxed and allowed at the sum of £1156.9.9 as appears by the Taxing Officer's Certificate dated the 17th day of December 1943.

I CERTIFY that the above is a true copy of the Judgment of the High Court of Australia in the abovementioned matter.

DATED the 23rd day of March, 1950.

1787 J. G. HARDMAN,
Principal Registrar.

(L. S.)

(Then follows certification of signature of J. G. Hardman by a Vice Consul of the United States.)

THE HIGH COURT OF AUSTRALIA
IN ADMIRALTY

No. 24.

1788 BETWEEN:

UNITED SALVAGE PROPRIETARY LIMITED and JOHN PROTHEROE WILLIAMS,

Plaintiffs,

and

THE SHIP *"Portmar"*

Defendant.

I, FRANCIS GREGORY MURPHY of 406 Collins Street Melbourne in the State of Victoria Australia Managing Law Clerk make oath and say:—

1. THAT I am Managing Law Clerk in the employ of Messrs. Madden Butler Elder & Graham the solicitors for the above named Plaintiffs and I had the conduct of the above action under the supervision of my said principals.

Libelant's Exhibit 5.

2. THAT the said Plaintiffs recovered against the Calmar Steamship Corporation the sum of £5,000 with costs to be taxed which costs were duly taxed and allowed at the sum of £1156.9.9 in respect of the said action

3. THAT the said sums of £5,000 and £1,156.9.9 were duly received by the said Madden Butler Elder & Graham as solicitors for the said Plaintiffs by the withdrawal from Court on the 1st day of December 1943 of the sum of £500 paid into Court by Malleson Stewart Stawell & Nankivell the solicitors for the said Calmar Steamship Corporation and by the payment of the sum of £5,656.9.9 by the said Malleson Stewart Stawell & Nankivell to the said Madden Butler Elder & Graham on the 9th day of February, 1944.

F G MURPHY

SWORN at Melbourne in the State of Victoria this 24th day of March, 1950.

Before me,

J. S. ELDER
Notary Public
Melbourne.

(SEAL)

(Then follows certification of signature of J. S. Elder by a Vice Consul of the United States.)

1792

Libelant's Exhibit 6.

Lloyd's War Risk Insurance policy on SS *Portmar* in the sum of $714,000 printed as Schedule A of Calmar's libel against Underwriters (p. 70).

Libelant's Exhibit 7.

Institute of London Underwriters War Risk Insurance policy on SS *Portmar* in the sum of $116,000. To be sepa-
1793 rately submitted to the Court.

Libelant's Exhibit 8.

Excess Insurance Co. Ltd's. War Risk Insurance policy on SS *Portmar* in the sum of $30,000. To be separately submitted to the Court.

Libelant's Exhibit 9.

1794

November 26, 1941
INS—*Portmar*—Voy. 39F

Mr. B. K. Ogden, Director
Division of Insurance
United States Maritime Commission
Washington, D. C.

SS. *Portmar* Voy. 39F

Dear Sir:

This will confirm telephonic conversation of November 25, 1941 between the writer and yourself at which time you were advised of the following rate quotations covering the various forms of war risk insurance for Charter's account

on one round voyage of our SS *Portmar* from United States Pacific port or ports to port or ports in the Philippine Islands, returning to United States North Atlantic via the Pacific Ocean and the Panama Canal.

1 —War Risk Insurance on Vessel based on valuation of $860,000.

(a) U. S. Market — (120 days voyage limit) quotes 1¾%

(b) London Market—(no time limit for voyage) limit quotes..... 1½% 1796

2A—War Risk on Life and Personal Injury of Officers and Crews based on a total of 35 men @ $5,000. per man—$175,000.

(a) U. S. Market (120 days voyage limit) quotes 1⅛%

(b) London Market (no time limit for voyage) quotes 9/16%

B—War Risk on Personal Effects Officers and Crews based on 8 officers and 1 radio operator 1797

@ $500. ..... $4500.

and 26 unlicensed members @ $150. ..... 3900.

Total ..... $8400.

(a) U. S. Market (120 days voyage limit) quotes 1⅜%

(b) London Market (no time limit for voyage) quotes 1½%

C—Slop Chest—$1000.00

(a) U. S. Market (No time limit for voyage) quotes 1%

1834 *Libelant's Trial Exhibit 20.*

which have been dated back. The Mate will explain this more fully.

In the log book I had listed James Freshour, the bearer of this, as a deserter. I did not then know that he was put in the hospital with an injured ankle. I ask you to have his name taken off the deserters list.

I hope you will excuse this rambling letter but I have tried to get as much information in as possible and I must now get Freshour ready and get his papers in order so that he can leave at daybreak.

1835 The lawyers which I have retained is one of the oldest and most respected firms in town and I have full confidence in their integrity. They were pointed out to me by the Agent and Consul but for my own satisfaction I also saw Capt. Cansey the U. S. Naval Attache.

I just notice in the papers that Sir Owen Dixon has been appointed Australian Minister to Washington.

It was impossible for me for a long time to get in touch with you under our proper address and I had in order to get in touch with you to send my wires through Bethlehem. This was not my fault but nobody would take my word for anything. I believe they will now and in the future.

1836 Yours very respectfully,

(Sgd.) AXEL MICHELSON

Libelant's Deposition Exhibit 22.

[WESTERN UNION TELEGRAM]

FY128 D24CDC 9M 90 VIA RCA

F MELBOURNE 1750 APR 20 1942

CALMAR STEAMSHIP CORP.
25 BROADWAY NYK

YOURS SIXTEENTH RECEIVED UNDERSTAND SALVAGE AUTHORISED BY AMERICAN ARMY STOP ARMY CLAIMS OWNERSHIP VESSEL STOP SOLICITORS ADVISE CLAIM

1798 *Libelant's Exhibit 9.*

(b) London Market (no time limit for voyage) quotes 1½%

3A—War Risk Protection & Indemnity including expenses incurred account contractual repatriation but not including wages and bonuses.

(a) U. S. Underwriters have declined to quote as they do not carry our ordinary P & I insurance.

(b) London Market (no time limit for voyage) quotes 23.1¢ per $100. on a valuation of $860,000.

1799

B—On Wages and Bonuses until repatriated, estimated to be about $8000, per month.

(a) U. S. Underwriters have declined to quote for same reason as above.

(b) London (no time limit on voyage) quotes as follows:

6 months wages, etc.	@	8000.—	$ 48,000.	@ 1½%
12 " " "		8000.	96,000.	1⅛%
1800 18 " " "		8000.	144,000.	⅞%
24 " " "		8000.	192,000.	¾%

The rates quoted above by London underwriters are subject to a discount of 7% and to an additional charge to cover the British Stamp Tax.

With your approval we have arranged coverage in London through our Insurance Brokers, Messrs. Mather & Company, of Philadelphia for items numbered one and two above. We have used in item one the valuation of $860,000. which is about $100.00 per deadweight ton. You informed us you thought that valuation was reasonable but could not definitely authorize. We thereupon contacted the Emergency Division for the approved figure but before this could

be obtained had to cable London to close as the ***Portmar*** was scheduled to sail today from San Francisco. We trust the Maritime Commission will approve the valuation of $860,000.

You have also authorized us to place the War Risk Protection and Indemnity insurance and the insurance on Wages and Bonuses until repatriated, Items 3A and 3B above, with the Insurance Fund of the Bethlehem Steel Corporation, which Bethlehem agrees to cover at premiums quoted by London Underwriters above. It is also understood that we are to cover for 12 months wages and bonuses only under Item 3B, but that the Maritime Commission will be responsible for any additional wages and bonuses in the event that liability for more than 1 year's wages and bonuses is incurred.

It is understood that should the voyage of the vessel be altered or changed by the charterer any additional premiums required by underwriters shall be for the account of the charterer.

Very truly yours,

CALMAR STEAMSHIP CORPORATION,

(Sgd.) H. W. Warley
President

c/r-GD-PORTMAR-VOY. 39F

1804

Libelant's Exhibit 10.

UNITED STATES MARITIME COMMISSION
Washington

February 20, 1942

Calmar Steamship Corporation
25 Broadway
New York, New York

Attention: Mr. H. W. Warley

Gentlemen:

1805 *SS Portmar*

We acknowledge receipt of your letter of February 3, your reference No. INS—*Portmar*—VOY. 39 F, and you are advised that the premium voucher, statement and receipted bills of Mather & Co. and Bethlehem Steel Corporation have been checked each with the other and with the time charter dated November 21, 1941, Contract MCc-1915, found in order, and passed on today for payment.

You are also advised for your record and file that the amount of premium bills is $38,073.87.

1806 Very truly yours,

B. K. OGDEN
Director, Division of Insurance

By: J. F. DELANEY

J. F. DELANEY, Chief
Insurance Policy Examining Section

1807

Libelant's Trial Exhibit 12.

Libelant's Deposition Exhibit 15.

[POSTAL TELEGRAPH]

LB156N 42 CABLE VIA IMPL=MELBOURNE 1 1446
FOR CALMAR=

1942 APR 1 AM 9 07

BETHLEHEM STEEL CORPN NEWYORK (BG)=
DIVERTED FROM MANILA TO SUVA ARRIVING TWENTIETH DECEMBER THENCE SYDNEY THIRTIETH DECEMBER BRISBANE FIFTH JANUARY DARWIN 1808
NINETEENTH JANUARY WYNDHAM EIGHTH FEBRUARY DARWIN TWELFTH FEBRUARY THENCE KOEPANG WHILST PROCEEDING INSTRUCTED RETURN DARWIN ARRIVING NINETEENTH FEBRUARY=

AXEL MICHELSON.
SUVA WYNDHEM KOEPENG.

Libelant's Exhibit 13.

[POSTAL TELEGRAPH]

LL FEB 23 PM 6.06 1809

N.WD277 33 GOVT=DC WASHINGTON DC 23 525P

CALMAR STEAMSHIP CORPORATION=
25 BROADWAY NEWYORK NY=

REGRET TO ADVISE YOUR STEAMER PORTMAR HAS BEEN REPORTED THROUGH BRITISH CHANNELS TO HAVE BEEN DAMAGED IN AIRRAID AT PORTDARWIN. EXTENT OF DAMAGE AND FURTHER DETAILS UNKNOWN. PLEASE FURNISH CREW LIST THIS OFFICE=
I M HOLT WAR SHIPPING ADMINISTRATION. (56).

1810

Libelant's Trial Exhibit 14.

Libelant's Deposition Exhibit 11.

[Postal Telegraph]

LA536N 39 IMP XCI=MELBOURNE 24 1855=

1942 MAR 24 PM 2.08

FOR CALMAR=

BETHLEHEM STEEL CORPN 25 BROADWAY NYC (BG)=
SHIP ACCESSIBLE HALF LENGTH AT LOW TIDE MY
1811 OPINION EXCESSIVE DAMAGE MAKES SALVAGE IMPOS-
SIBLE STOP HAVE YOU ANY INSTRUCTIONS I SHOULD
FOLLOW TO PROTECT OWNERS INTERESTS=

AXEL MICHELSON/CARE DALGETY CO

(40).

Libelant's Exhibit 15.

[Postal Telegraph]

1942 MAR 23 PM 2 47

TK76N 52 IMP MELBOURNE 23 2200

1812 FOR CALMAR BETHLEHEM STEEL CORPN=
25 BROADWAY NEWYORK (BG)=SUBJECT TO
CORRECTION

WITH EXCEPTION THOMAS TYRRELL AB NOW DE-
CEASED ALL CREW PERSONNEL SAFE AND RETURN-
ING SOONEST POSSIBLE STOP MUIR KING FANJOY
CURRIER WILKINSON HILLS RIDDELL DREXEL AL-
READY REPATRIATED STOP FRESHOUR IN HOSPITAL
NOT SERIOUS STOP BALZER FAILED JOIN STOP
HAVE APPOINTED DALGETY COMPANY AGENTS=

=AXEL MICHELSON

(05)

25 AB FANJOY CURRIER FRESHOUR AXEL

1813

Libelant's Trial Exhibit 16.

Libelant's Deposition Exhibit 13.

[POSTAL TELEGRAPH]

3/27/42

LC
AXEL MICHELSON
CARE DALGETY AND COMPANY
461 BOURKE STREET
MELBOURNE (AUSTRALIA)

YOUR TWENTYTHIRD TWENTYFOURTH RECEIVED STOP ASKING UNDERWRITERS FOR INSTRUCTIONS OF WHICH WILL ADVISE YOU STOP WE HAVE NO ADVICES ITINERARY SHIP WHICH REQUIRED FOR INSURANCE PURPOSES STOP IF PERMITTED ADVISE ITINERARY SHIP SINCE LEAVING STATES 1814

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK CITY NY)

Libelant's Trial Exhibit 17.

Libelant's Deposition Exhibit 14. 1815

[POSTAL TELEGRAPH]

LJ155N 56 IMP XCI FIL=MELBOURNE 30 1510—

1942 MAR 30 PM 5 52

CALMAR

BETHLEHEM STEEL CORPN 25 BROADWAY NYC= CONSULTED BY MICHELSON SHIP FOUNDERED STOP ACCESSIBLE HALF LENGTH AT LOW TIDE BUT MICHELSON CONSIDERS CONSTRUCTIVE TOTAL LOSS STOP RECOMMEND TENDER ABANDONMENT STOP MICHELSON JUST ARRIVED AND PROTEST NOTED STOP DELAYED ARRIVAL AND PROTEST COMPLETELY JUSTIFIED STOP APPLY NAVY FURTHER PARTICULARS STOP ACKNOWLEDGE=

MALLESON STEWART AND CO SOLICITORS MELBOURNE.

1816

Libelant's Trial Exhibit 18.

Libelant's Deposition Exhibit 12.

UNITED STATES MARITIME COMMISSION
Washington

April 3, 1942

CONFIDENTIAL

Mr. H. W. Warley, President
Calmar Steamship Corporation
25 Broadway
1817 New York, New York

SS. *Portmar*

Dear Mr. Warley:

On February 23rd we received advices through the Navy to the effect your SS. *Portmar* was damaged in an air raid February 19th, 1942 at Port Darwin. We were advised the extent of damage to the ship and further details with respect to the crew unknown.

On April 1st we received through Navy channels a despatch from the Naval Observer, Melbourne, reading as follows:

1818

"Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store".

Very truly yours,

J. C. OUTLER
Chief, Ship Control Section
War Shipping Administration

1819

Libelant's Trial Exhibit 19.

Libelant's Deposition Exhibit 17.

[WESTERN UNION CABLEGRAM]

APRIL 7, 1942

MALLESON STEWART & CO.
MELBOURNE, AUSTRALIA

GIVING UNDERWRITERS NOTICE ABANDONMENT PORTMAR INFORM MASTER

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION 1820
25 BROADWAY
NEWYORK, N Y

Libelant's Trial Exhibit 20.

(Consisting of 20 cables and 1 letter)

Libelant's Deposition Exhibit 16.

[POSTAL TELEGRAPH]

LP271N 33 CABLE VIA IMPERIAL XCI FIL=MELBOURNE 1821
6 1942 APR 6 PM 2 27

CALMAR=

=CARE BETHLEHEM STEEL 2 BWAY NYC (BG)=
YOURS TWENTYSEVENTH RECEIVED STOP SENT CHIEF MATE HOME WITH CREW AND ACCOUNTS STOP WILL FOLLOW AS SOON AS YOUR INSTRUCTIONS RECEIVED AND CARRIED OUT=

AXEL MICHELSON.

1822 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 18.

[WESTERN UNION CABLEGRAM]

NEW YORK, APRIL 10, 1942

AXEL MICHELSON
CARE MALLESON, STEWART & CO., SOLICITORS
MELBOURNE
AUSTRALIA

YOURS FIRST AND SIXTH RECEIVED PLEASE ARRANGE RETURN HOME SOON AS POSSIBLE

1823 H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

MPB

Libelant's Deposition Exhibit 19.

[POSTAL TELEGRAPH]

LB310N 63 IMP CABLE=N MELBOURNE 13 1735
CALMAR STEAMSHIP CORPN=
25 BWAY NYC (BG)=

1824 YOURS TENTH RECEIVED SINCE INFORMED SHIP REFLOATED AUSTRALIAN AUTHORITIES SALVAGE CARGO STOP SALVAGE OFFICER CONSIDERS SUBJECT FURTHER EXAMINATION AND TEMPORARY REPAIRS COULD PROCEED UNDER STEAM DOCKYARD PORT STOP UNTIL DOCKED CANNOT ASSESS PERMANENT CONDITION HULL STOP VIEW ABSENCE NORMAL VIBRATIONS HULL AFTER NUMEROUS NEAR MISSES PERSONALLY BELIEVE STRUCTURE WEAKENED THROUGHOUT STOP DO INSTRUCTIONS RETURN STAND

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1825

Libelant's Deposition Exhibit 20.

[WESTERN UNION CABLEGRAM]

APRIL 16, 1942

CAPTAIN MICHELSON.
CARE MALLESON, STEWART & CO
MELBOURNE
AUSTRALIA

YOURS THIRTEENTH CANCEL PREVIOUS INSTRUCTIONS AND REMAIN AUSTRALIA UNTIL FURTHER ADVISED STOP PLEASE CABLE PROMPTLY FULL REPORT STATUS 1826
VESSEL

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

Libelant's Deposition Exhibit 21.

James G. Freshour

Melbourne, Victoria, April 17, 1942
Nearly Midnight 1827

Mr. H. W. Warley, President,
Calmar Steamship Corporation.
25 Broadway, New York, N. Y.

Dear Sir:

This will be handed to you or to Mr. Usher by Mr. James G. Freshour, who will for identification purposes sign his name above the date of this. He is the last man, but myself, of the *Portmar's* crew to return to U. S.

Melbourne is more than 2000 miles away from the place where *Portmar* was beached, before she sunk. It is for military reasons, impossible or almost so, to get here from Melbourne to Darwin or return.

1828 *Libelant's Trial Exhibit 20.*

I am trying to keep my eyes open and see what they are doing to Americans here, and it is plenty.

I heard that the *Portmar* had been refloated from a fellow, who works for a Classification Society, but I could get no confirmation of such news. As this would change the whole situation I was very anxious to get exact information and I succeeded with my, or rather our lawyer to see Sir Owen Dixon, a High Court Justice, who is at present supreme in Australian Shipping Control. Sir Owen had summoned a Captain Williams, head of a salvage concern
1829 who had refloated the *Portmar* and made him tell his story. The ship was refloated only for the reason that half the field guns and equipment of an American Regiment of Field Artillery was in our 4 and 5 holds and the Chief Mate and Chief Engineer will, when they arrive, tell you that to refloat the ship was no great feat in itself. Having got her afloat the salvage company, who through the Australian Navy did the work for the American Army, decided that it would be possible to repair her and put her back into service and they are undoubtedly this minute in touch with the Insurance Company telling them how easy it would be to do this. In my honest opinion it cannot be done because she is so weakened in her structure and has so much dam-
1830 age to hull; boilers and engine that it will cost considerable more to rebuild her than the result would be worth.

The nearest dry dock is 3000 miles away in Sydney. There are no facilities at all in Darwin so that she could be temporarily repaired so that she could even make this trip under her own steam. With the Japanese patrolling at least the first 1500 miles of this distance daily there is no chance at all that she would ever reach Sydney. I might also mention that ships waiting for dry dock repairs in Sydney when we were there four months ago are still waiting.

Sir Owen Dixon and Captain Williams are now, and this is a fact of which I have personal knowledge, in touch with Mr. William Wasserman the New American Lease Lend

Libelant's Trial Exhibit 20.

Director for Australia. He has just arrived. They are trying to get him to authorize money enough to pay all the enormous expenses that it would take to make her a serviceable ship again. They all act as if she was a prize of war instead of her being the property either of the Calmar Line or the Insurance Company but as long as they can work on American money they seem to have few scruples. I have just a few minutes ago had a phone call from the lawyers and they read your latest telegram to me that orders me to stay here in Australia until further orders. If the tender of abandonment has been withdrawn by you or if it has not been accepted by the insurers, I shall do everything in my power to safeguard your property and your interests but I would appreciate it if you will as much as possible keep me informed of your wishes and desires in the matter.

The Chief Mate and Chief Engineer will tell you all about the state of the ship. There is nothing left in her of anything. The hull is so shaken up that at least half the rivets in my opinion will have to be redriven. She leaks through stern tube and bottom and movements of shell plating on frames has taken place along her port side at least half her length.

At dusk when I returned to my hotel I met Mr. Brown from Sydney, the General Agent in Australia of the Matson Line, on the street. He told me that Col. Frank La Rue, commanding all American troops in the Darwin area had told him that the *Portmar* would be repaired at any cost because U. S. Army wanted her here on the Coast. But then I do not trust Mr. Brown too much. The Matson Line are Agents for U. S. Army in Australia and are running their ships out here as Army transports but they return as Matson ships, when they go back. Also, I noticed that they get all the wool, while the other U. S. ships get the lead and the chrome ore. With James Freshour, the bearer of this, I send you also the protests.

Those made out by the lawyers are the original ones. The others made out by the consul are copies of them,

Libelant's Trial Exhibit 20.

1837

UNFOUNDED OWNERSHIP REMAINS IN COMPANY OR UNDERWRITERS STOP FURTHER INFORMATION CONDITION VESSEL AWAITS SALVAGE COMPANY DIVERS REPORT STOP ADVISE WHETHER ABANDONMENT ACCEPTED BY UNDERWRITERS IF NOT SOLICITORS SUGGEST YOU OBTAIN CONCURRENCE UNDERWRITERS OUR TAKING ALL NECESSARY ACTION REBUT ARMY CLAIM WITHOUT PREJUDICE NOTICE ABANDONMENT STOP COURSE PROPOSED IS FORMAL REPOSSESSION OF VESSEL OR IF OTHER PARTIES IN POSSESSION INJUNCTION RESTRAINT THEM INTERFERING WITH PROPERTY

AXEL MICHELSON 1838
1222P

Libelant's Deposition Exhibit 23.

[WESTERN UNION TELEGRAM]

APRIL 21, 1942

AXEL MICHELSON
MALLESON, STEWART & CO
MELBOURNE
AUSTRALIA

1839

YOURS TWENTIETH ABANDONMENT NOT ACCEPTED STOP TITLE VESTED UNDERWRITERS IF ABANDONMENT GOOD OTHERWISE REMAINS IN OWNERS STOP ADVISE NAME ARMY OFFICER ASSERTING OWNERSHIP STOP ADVISE POSSIBILITY YOUR RETURNING VESSELS LOCATION STOP WE AWAIT YOUR REPORT PRESENT CONDITION VESSEL

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

1840

Libelant's Trial Exhibit 20.

Libelant's Deposition Exhibit 24.

[POSTAL TELEGRAPH]

RAA145 224 IMP FIL
MELBOURNE 25 1200

APR 25 AM 6 28 INS—PORTMAR—WI

CALMAR STEAMSHIP CORPORATION
25 BROADWAY NEW YORK

1841 YOURS TWENTY FIRST AM ASSURED PREVIOUS UNDERSTANDING ARMY ASSERTING OWNERSHIP MISAPPREHENSION STOP DIVERS REPORT FOLLOWS QUOTE TEMPORARY REPAIRS COMPLETED OIL LEAKAGE GENERAL IN TANK TOP STOP CANNOT RAISE STEAM OWING TO DANGER OF FIRE STOP TUG URGENTLY REQUIRED POSITION SALVAGE EXCELLENT STOP RUDDER AND

(PAGE 2)

HAND STEERING GEAR IN GOOD ORDER END QUOTE GOVERNMENT SALVAGE BOARD OFFICER NOW AGREES MY VIEW THAT OWING ABSENCE FACILITIES PUT VESSEL IN SAFE CONDITION CANNOT BE MOVED EX-
1842 CEPT BY TOWING STOP LEAKAGE OIL INDICATES PERFORATED BOTTOM STOP INFORMED TAKES SIX INCH PUMP CHECK FLOW STOP NEAREST DRY DOCK WHERE

(PAGE 3)

SHIP WAS NEW YEAR STOP TOW DIFFICULT AND RISKY STOP SALVAGE BOARD HAS WAR TIME POWERS MAKE SALVAGE ARRANGEMENTS TO EXCLUSION ANY STEPS CONTEMPLATED BY OWNERS OR UNDERWRITERS STOP BOARD HAS REQUESTED LEASE LEND AUTHORITIES FINANCE SALVAGE STOP UNDERSTAND ONLY CONCERN LEASE LEND AND AMERICAN ARMY RECONDITION SHIP FOR USE

Libelant's Trial Exhibit 20. 1843

(PAGE 4)

HOWEVER DESIRABLE STOP BOARD ADVISES TWO TUGS NECESSARY BUT DOUBTFUL ANY AVAILABLE STOP ALSO DOUBTFUL WHETHER DOCK AVAILABLE FOR SEVERAL MONTHS STOP NO DECISION FUTURE ACTION YET MADE STOP SALVAGE BOARD WILL CLAIM SALVAGE REWARD FOR RAISING IF SHIP FINALLY RECOVERED STOP IF FACILITATED BY ARMY COULD RETURN LOCATION TWELVE

(PAGE 5)

DAYS STOP AT PRESENT CAN DO MORE HERE STOP 1844
MATE AND CHIEF ARRIVING SOON STOP IF SHOWN TELEGRAMS COULD SUPPLY FULL INFORMATION

AXEL MICHELSON

Libelant's Deposition Exhibit 25.

[POSTAL TELEGRAPH]

LONG LA686N 61 CABLE VIA IMPRIAL XCI=MELBOURNE 28 8)=

DLT CALMAR STEAMSHIP CORP=25 BROADWAY NEW 1845
YORK (KBG)=

LL APR 29 PM 7 20

THE FOLLOWING MY OWN BUT UNCHANGED WELL CONSIDERED OPINION THAT SHIP CONSTRUCTIVE TOTAL LOSS OPINION SALVORS AND REPORT THEIR DIVERS PREVIOUSLY QUOTED NOT IN KEEPING WITH WHAT I KNOW AND HAVE SEEN BEFORE SHIP FILLED WITH OIL AND SAND STOP SHIP SALVABLE ONLY IF RISKS EXPENSES AND LOSS OF TIME ABSOLUTELY IGNORED=

AXEL MICHELSON.

1846 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 26.

[Western Union Telegram]

1942 MAY 22 PM 6.35

FY441 VIA RCA=F MELBOURNE 22 NFD
NLT CALMAR STEAMSHIP CORPN=
25 BROADWAY NEW YORK=

OF NO USE HERE LONGER COULD IF BECOME NECESSARY BE SENT OUT AGAIN—

1847 AXEL MICHELSON.

MICHELSON.

Libelant's Deposition Exhibit 27.

[Postal Telegraph]

L40 36 CABLE FIL VIA IMPL XCI=MELBOURNE 1125 MAY 27 1942

CALMAR STEAMSHIP CORPN=
25 BROADWAY NEW YORK=

1848 HAVE YOU RECEIVED CABLES OF APRIL TWENTYFIFTH AND TWENTYEIGHTH STOP HAVE MATE AND CREW ARRIVED AND FRESHOUR WITH EXTENDED PROTEST STOP RETURNING HOME IF NO FURTHER INSTRUCTION RECEIVED=

AXEL MICHELSON.
25 FRESHOUR FURTH. 945A

Libelant's Trial Exhibit 20. 1849

Libelant's Deposition Exhibit 28.

[WESTERN UNION CABLEGRAM]

MAY 26, 1942

AXEL MICHELSON
c/o MALLESON STEWART & CO
MELBOURNE
AUSTRALIA

REGRET UNABLE APPROVE YOU RETURN HOME FOR PRESENT AS NECESSARY YOU REMAIN UNTIL AFTER PROPOSED INSPECTION AND SURVEY OF VESSEL IN 1850
DRYDOCK. PROBABLY AT PORT WHERE SHE WAS JANUARY FIRST STOP YOU AND ATTORNEYS WILL PLEASE CONTACT CHARLES BROWN AGENT MELBOURNE FOR MARITIME COMMISSION RESPECTING SURVEY STOP BROWN WILL ASSIST IN ARRANGING SURVEY WHICH WE ARE ADVISED WILL HAVE TO BE DONE BY SUPERINTENDENT ARMY TRANSPORT ABOVE PORT STOP IF ATTORNEYS APPROVE SUGGEST AMERICAN TRADING COMPANY BE RETAINED AS OUR SURVEYORS.

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY) 1851

Libelant's Deposition Exhibit 29.

[WESTERN UNION TELEGRAM]

1942 MAY 27 AM 10 23

FY58 19 VIA RCA—F MELBOURNE 27 1720
CALMAR SHIPPING CORP—
25 BWAY NYK—

YOURS TWENTYSIXTH RECEIVED AND UNDERSTOOD SHALL REMAIN AND CARRY OUT ORDERS—.

AXEL MICHELSON.

25.

1852 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 30.

[WESTERN UNION CABLEGRAM]

JUNE 27, 1942

AXEL MICHELSON
C/O MALLESON, STEWART AND CO.
MELBOURNE
AUSTRALIA

MARITIME COMMISSION INFORMS US VESSEL ALREADY AT OR ENROUTE TO PORT WHERE SHE WAS JANUARY
1853 FIFTH STOP SUGGEST YOU CONFIRM WITH BROWN AND GO THERE PROMPTLY FOR SURVEY STOP PLEASE ACKNOWLEDGE

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

Libelant's Deposition Exhibit 31.

[RCA RADIOGRAM]

1854

JUN 29 AM 9 23

CFA/MQ ML 117
MELBOURNE 21 29 1321

H W WARLEY PRESIDENT CALMAR STEAMSHIP CORPORATION 25
BROADWAY NEW YORK

YOURS TWENTYSEVENTH. WILL MEET VESSEL ON ARRIVAL DESIGNATED PORT

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1855

Libelant's Deposition Exhibit 32.

[WESTERN UNION TELEGRAM]

1942 JUL 1 AM 10 56

FV286 VIA RCA-F MELBOURNE 26 1/1715
H W WARLEY PRESIDENT CALMAR STEAMSHIP CORPORATION—
25 BROADWAY NYK—

EARLIEST ARRIVAL VESSEL TWELVE DAYS STOP SEND THREE EACH, DECK ENGINE AND OFFICIAL 1856
LOGS—

AXEL MICHELSON.

Libelant's Deposition Exhibit 35.

[WESTERN UNION CABLEGRAM]

NEW YORK, N. Y., JULY 20, 1942

CAPTAIN AXEL MICHELSON
c/o MALLESON, STEWART AND COMPANY 1857
MELBOURNE
AUSTRALIA

ASSUME VESSEL AT OR NEAR REPAIR STATION STOP YOU UNDERSTAND THOROUGH SURVEY MUST BE MADE AND ESTIMATE MADE COST REPAIRS INCLUDING COST RAISING AND TOWING ALSO ESTIMATE OF VALUE OF VESSEL WHEN REPAIRED STOP LOGBOOKS SENT YOU MAIL FOURTH

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION
(25 BROADWAY NEW YORK NY)

1858 *Libelant's Trial Exhibit 20.*

Libelant's Deposition Exhibit 36.

[Postal Telegraph]

K11 21 CABLE VIA IMP=MELBOURNE FIL 0940 JUL 23 1942

H W WARLEY=

PRESIDENT CALMAR STEAMSHIP CORPN 25 BROADWAY NY=

VESSEL MAY ARRIVE WEEKS TIME FULLY UNDERSTAND YOUR INSTRUCTIONS=

1859 AXEL MICHELSON.

Libelant's Deposition Exhibit 47.

[RCA Radiogram]

JAN 27 1943

HRCFA ML82

MELBOURNE 27 26 1130 XCI

NLT H W WARLEY PRESIDENT CALMAR STEAMSHIP

1860 CORPORATION

BROADWAY NEW YORK=

NO USE REMAIN LONGER LAWYERS HAVE CASE WELL IN HAND WANT CALMAR SHIP SEND ORDERS

AXEL MICHELSON

Libelant's Trial Exhibit 20. 1861

Libelant's Deposition Exhibit 48.

[RCA RADIOGRAM]

MAR 3 1943

CFATO ML52
MELBOURNE 33 2 17 XCI

NLT H W WARLEY PRESIDENT CALMAR STEAMSHIP CORP 25 BWAY NYC

ALL MY TESTIMONY IN THE CASE HAS BEEN TAKEN AND ALL SURVEY REPORTS AND ADJUSTMENTS NOW TURNED IN TO SOLICITORS 1862

AXEL MICHELSON

Libelant's Deposition Exhibit 49.

[WESTERN UNION CABLEGRAM]

NEW YORK MARCH 3, 1943

CAPT. AXEL MICHELSON
C/O MALLESON STEWART & COMPANY
46 QUEEN STREET
MELBOURNE, AUSTRALIA 1863

SUBJECT TO APPROVAL MALLESON STEWART YOU MAY RETURN HOME

H W WARLEY PRESIDENT
CALMAR STEAMSHIP CORPORATION

1864

Libelant's Exhibit 21.

WAR SHIPPING ADMINISTRATION
WASHINGTON

Refer to: FJZ

October 24, 1942

Calmar Steamship Corporation
25 Broadway
New York, New York

'NS—*Portmar*—W1

1865 Attention: W. H. Warley
President

Gentlemen:

Re: Time Charter—SS *Portmar*—Contract MCc-1915

Your letter dated October 19, 1942, addressed to the United States Maritime Commission has been referred to me. I have the following to say with respect to your summary of the immediate important steps suggested, numbered one to five inclusive on Page 5 of your letter.

(1) We are agreeable to your recommendation that the Salvage Board complete the tow of the *Portmar* to the Port of Sydney at which port she may be surveyed or re-
1866 paired. In the alternative the vessel may proceed under her own power. The repairs, of course, will depend upon the action taken with respect to the disposition of the vessel. We should prefer to submit the Board's claim for compensation for the raising and towing of the vessel and the Army's claim for work done on the vessel to arbitration. If arbitration is not feasible, we recommend submission of these claims to the Australian Courts.

(2) We are agreeable to the recommendation made in the paragraph marked 2, namely, the Commission will join with you in making an effort to obtain full survey of the damage to the vessel upon being drydocked and of cost of repairing such damage so as to restore her to the condition at which she was at the time of her bombing. This survey,

Libelant's Exhibit 21.

of course, shall be without prejudice as to whether the condition of the vessel at the time of bombing met the requirements of full classification.

(3) We shall assist in obtaining, without prejudice, a valuation of the vessel as she will lie damaged in Sydney after the survey.

(4) It is our position that the Commission's obligations under the charter to pay hire ceased at the time of the sinking at Port Darwin. We have previously written suggesting that the War Shipping Administration purchase this vessel in her sunken condition following enemy action at Port Darwin on February 19, 1942, the value of the vessel to be the subject of mutual consent. A possible determination of the purchase price would be as for just compensation in accordance with the provisions of Section 902 of the Merchant Marine Act. In the alternative the purchase price might be arrived at by deducting from the insured value of $860,000 the cost of raising the vessel, towage, salvage or other work performed by the Army, the estimated cost of repairs necessary to restore the vessel to her condition at the time of the bombing, and such other expenses directly related to the further operation of the vessel.

The above will be conditioned upon the approval of your underwriters and the suggestions are and the final agreement would be without prejudice to any of the rights of interested parties.

We shall be obliged for a prompt reply.

Very truly yours,

W RADNER

William Radner
General Counsel

1870

Libelant's Trial Exhibit 22.

Deposition Exhibit 46.

[WESTERN UNION TELEGRAM]

WU232 TWS PAID 3 GOVT=WUX WASHINGTON DC 12 345P

1942 NOV 12 PM 3.50

CALMAR STEAMSHIP CORP=
25 BROADWAY NYK=

1871

WAR SHIPPING ADMINISTRATOR HAS REQUISITIONED TITLE TO AND POSSESSION OF YOUR VESSEL SS PORTMAR OFFICIAL NUMBER 219283 NOW AT BRISBANE EFFECTIVE UPON TAKING POSSESSION THEREOF FOR PURPOSES SUCH REQUISITION, PURSUANT TO SECTION 902 OF MERCHANT MARINE ACT 1936 AS AMENDED OUR REPRESENTATIVE AT SYDNEY HAS BEEN INSTRUCTED TO TAKE DELIVERY OF VESSEL AS SOON AS POSSIBLE AND TO GIVE YOUR REPRESENTATIVE APPROPRIATE RECEIPT THEREFOR COMPENSATION FOR VESSEL WILL BE DETERMINED AND MADE IN ACCORDANCE WITH ABOVE MENTIONED PROVISION OF LAW=

1872

W C PEET JR SECRETARY.

Libelant's Exhibit 23.

1873

UNITED STATES OF AMERICA
WAR SHIPPING ADMINISTRATION

BRISBANE, QUEENSLAND
November 17, 1942.

THIS IS TO CERTIFY that the United States War Shipping Administrator has requisitioned title to and possession of the vessel *"Portmar"* pursuant to the provisions of Section 902 of the Merchant Marine Act of 1936 as 1874
amended, effective as of the date and hour of taking delivery thereof; that the undersigned, H. A. Rettig, acting for and on behalf of the War Shipping Administrator has taken delivery at 12 o'clock noon on November 17, 1942, Eastern Australian Time, at Brisbane, Queensland, Australia, and that such requisition has therefore become effective at the said date and hour.

(SGD) H. A. RETTIG
Superintending Engineer

United States War Shipping Administration 1875

Libelant's Exhibit 24.

Computation of charter hire of SS *Portmar* from February 19, 1942 to November 17, 1942. To be separately submitted to the Court.

Libelant's Exhibit 25.

List of expenses paid by Calmar Steamship Corporation. To be separately submitted to the Court.

1876

Libelant's Exhibit 25A.

EXPENSE ITEMS FROM LIBELANT'S EXHIBIT 25 WHICH LIBELANT CLAIMS ARE CHARGEABLE TO UNDERWRITERS IN THIS CASE:

SALVAGE JUDGMENT AND COSTS:

ITEM 1:

Amount paid by Malleson, Stewart to satisfy Salvage Judgment and Costs	$20,008.59

1877

SUE AND LABOR EXPENSES:

ITEM 1:

Amount retained by Malleson, Stewart for their fee and disbursements	$ 7,313.76

ITEM 2:

Howell & Gibson—Survey fee	397.50

ITEM 3:

Captain Michelson's Expenses:

1878

Expenses until leaving Darwin	92.40
Expenses to Brisbane via Sydney	40.24
Expenses surveying ship Brisbane	16.72
Expenses Sydney	1.84
Fare Melbourne	17.85
Fare Melbourne (second trip)	17.85
Telegram to Lawyers in Melbourne	3.53

Libelant's Exhibit 26. 1879

Paid to Dalgety for car hire, survey fee of Taylor & Horne, etc.	89.50	
Cables sent by Michelson	66.94	
ITEM 4:		
Wages—Capt. Michelson From Feb. 20, 1942 to return to New York, exclusive of repatriation period	5,817.60	1880
ITEM 5:		
Meals and lodging allowance to Capt. Michelson	2,926.00	
ITEM 8:		
Cablegrams to Melbourne	1,138.61	
	$17,940.34	$17,940.34
	Total	$37,948.93

Libelant's Exhibit 26. 1881

Deposition of Captain Axel Michelson (pp. 272 to 449).

Libelant's Exhibit 27.

Profile plan of SS *Portmar.* To be separately submitted to the Court.

Libelant's Exhibit 29.

Chart of harbor of Port Darwin with marks made by Captain Michelson. To be separately submitted to the Court.

1882

Libelant's Exhibit 30.

Receipt dated February 21, 1942, given to Captain Michelson for secret codes, by Australian Naval Authorities. To be separately submitted to the Court.

Libelant's Trial Exhibit 31.

Deposition Exhibit 6.

1883

HEADQUARTERS
BASE SECTION NUMBER ONE
Darwin, Northern Territory, Australia

26 February 1942

MEMORANDUM

To: Captain Michelson and members of the crew of the SS. *Portmar.*

1. Confirming my verbal statement of February 24 concerning transportation to Melbourne for all survivors of ships sunk at Darwin. As soon as transportation is available and the line of communications can carry personnel you will be dispatched to Melbourne.

1884

2. Further I wish to make a matter of record my appreciation to your crew for their assistance in offloading the SS. *Admiral Halstead.* Please be assured that the working of gasoline from the *Halstead* will in no way delay your departure.

Frank Larue

FRANK LARUE
Lt. Col., Inf.
Commanding

Libelant's Exhibit 33. 1885

Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engineer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A. B., before United States Vice Consul at Melbourne, dated March 25, 1942. To be separately submitted to the Court.

Libelant's Exhibit 35.

Captain Michelson's extended protest before Edward James Hamilton, Notary Public, dated March 27, 1942 at Melbourne, Australia. To be separately submitted to the Court. 1886

Libelant's Trial Exhibit 39.

Deposition Exhibit 37.

Brisbane,
Queensland.

August, 1st, 1942. 1887

Captain Douglas Taylor.
Marine Surveyor.,
Circular Quay,
Brisbane.

Dear Sir,

Having received orders from my owners, the Calmar Steamship Corporation of 25 Broadway, New York, to employ surveyors for an owners survey of the SS. *"Portmar"* which has recently arrived at this port after having been raised and towed down from Port Darwin, where she was sunk by enemy action on Feb. 19th, you have by Dalgety's, my agents in Brisbane, been recommended to

1888 *Libelant's Trial Exhibit 39.*

me for such survey. It was pointed out to me by them that you were Surveyor to the American Bureau of Shipping, British Corporation Register, Norwegian Veritas etc.

You are therefore respectfully requested to carry out such a survey for us, or as much of it as would be possible for you without seeing the ship in a dry dock. It being my understanding that no dock in Brisbane is of sufficient capacity to accommodate the vessel. If it would later on be possible for you to complete the survey after the ship has been moved to a port where she can be dry docked, it would be much appreciated.

1889 Besides furnishing me with a report of the present condition of the ship, that is, Hull and Machinery, you are requested also to give me your estimate of the time and cost required for such repair, reconditioning and re-equipment of the ship, as would regain her her former class in Lloyd's.

Your report would be expected to contain, besides a general description of Hull, Machinery and boilers in their present condition also some details of the condition of decks, steel and wooden, bridge, rigging, cargo gear, winches and deck machinery, deck houses, wheel house and radio house, quarters in deck houses and poop for officers

1890 and crew; also of holds, hatches, and cargo battens and ceiling on tank tops, steering gear and steering engine, engineers machine shop, dynamos, condenser, pumps and auxiliaries, propellor and shafting, refrigerating machinery, radio equipment and a short statement on the condition or non-existence of equipment in the navigating department and also deck, engineer and stewards departments.

It is hoped that you will be able to give me an early and favourable answer to my above request.

Very respectfully yours,

AXEL MICHELSON,
Master, SS. *Portmar*,
C/—Dalgety & Co. Ltd. Brisbane.

Libelant's Trial Exhibit 40, 1891
Deposition Exhibit 38.

R. DOUGLAS TAYLOR

Marine Surveyor

Claims Adjuster
Ship Valuator
Measurer and
Compass Adjuster
Cable Address: "Rolyat"
Codes Used A B C 5th Edition

Telephone B 6435
Surveyor to
the
British Corporation Registry
American Bureau of Shipping
Bureau Veritas
Det Norske Veritas
Registro Navale Italiano
and
Imperial Japanese Corporation

Circular Quay,
Petrie's Bight. 1892

Brisbane 4th August, 1942.

Captain A. Michelson,
s.s. *"Portmar"*
C/—Messrs. Dalgerty & Co. Ltd.,
Brisbane.

Dear Sir.

I have to acknowledge receipt of your letter of August 1st. in which you have explained fully my duties in respect to making survey of the s.s. *"Portmar"* which will probably be in Brisbane for some considerable time. 1893

This survey, I understand, will be on behalf of your Owners and self. I have carefully read your letter and understand fully what you require and therefore will carry out your instructions to the best of my ability.

I intend to ask Lieut. Commr. A. G. Horn, R. A. N. R., Engineer Surveyor, to assist me in this work so far as engines and machinery are concerned. He has had wide experience in this work and is recommended as a very clever engineer, and he holds 1st. class Board of Trade Steam & Diesel Engine Certificates, 1st class Engine Aust. Certificate and 1st class Refrigerating Certificates, and his assistance will be most valuable.

This survey will undoubtedly take some time to complete but I will furnish you with reports as soon as possible.

Yours respetfully,

R. DOUGLAS TAYLOR,
Marine Surveyor.

1894

Libelant's Trial Exhibit 41.

Deposition Exhibit 39.

Headquarters
United States Army Services of Supply
Southwest Pacific Area
Transportation Service

A. P. O. 501
TGP.ah

1895

July 27th, 1942.

Subject: s.s. *"Portmar"*

To: The Superintendent, Army Transport Service, Base Section 3, A. P. O. 923.

1. This will authorize you to permit bearer, Captain Axel Michelson, former Master s.s. *"Portmar"*, to visit this vessel while she is in the port of Brisbane, for the purpose of inspecting her condition.

For the Chief of Transportation Service:

1896

T. G. PLANT,

T. G. Plant,
Colonel, A. U. S.,
Chief of Water Section.

Signature of Capt. Michelson:

Axel Michelson.

Approved:

J. M. Grimm,
Supt. A. T. S.,
Brisbane, July 30th, 1942.

Libelant's Trial Exhibit 42. 1897

Deposition Exhibit 40.

COMMONWEALTH SALVAGE BOARD

BRISBANE, 13th August, 1942.

Captain Michelson.
C/o Messrs. Dalgety & Co. Ltd.,
Brisbane.

Dear Sir.

1898

This is to advise you that the Salvage Board is prepared to allow you to board the s.s. *"Portmar"* in company with your Surveyors for the purpose of ascertaining the present condition of the vessel. It is understood that you will furnish the Salvage Board with a copy of the Surveyors' Report in due course provided you are permitted to do so by your Legal Advisers.

Yours faithfully,

J. P. WILLIAMS
Chief Salvage Officer.

1899

This letter is to be retained by Capt. Michelson so that he may board the ship whenever he desires. This applies also to his Surveyors.

J. P. WILLIAMS

1900

Libelant's Trial Exhibit 43.

Deposition Exhibit 41.

COMMONWEALTH OF AUSTRALIA

Crown Solicitor's Office,
450 Law Courts Place,
Melbourne C. 1.

19th August 1942.

Messrs. Malleson Stewart & Co.
Solicitors,
1901 46 Queen Street,
Melbourne C. 1.

Dear Sirs,

S.S. *"Portmar"*: Salvage Service

I understand that you act for the owners of s.s. *"Portmar"* which was sunk by enemy action at Darwin.

2. The Salvage Board established by the National Security (Salvage Board) Regulations and the Chief Salvage Officer, with suitable assistance, carried out salvage
1902 of the s.s. *"Portmar"* including towage to a safe port and the Board has instructed me to require payment from the owner of the *"Portmar"* of the sum of £100,000 in respect thereof.

3. Failing payment or satisfactory arrangements for the payment of salvage remuneration, my instructions are to issue a write for recovery of the amount claimed.

Yours faithfully,

H. F. E. WHITLAM
Crown Solicitor

Libelant's Trial Exhibit 44. 1903

Deposition Exhibit 42.

BRISBANE AUG. 14 '42

Malleson Stewart & Co.
Queen Street, Melbourne

Gentlemen:

On receiving your wire yesterday I saw Col. Grimm at once. He told me that he would put me on board the ship with my surveyors at any time in spite of anybody. Later in the day I was with Mr. Smales of Dalgety's invited to meet Capt. Williams and Mr. Rogan at McDonald Hamiltons. Present also was Mr. Plant of Gibbs Bright & Co. who is Lloyds Agent. I showed them your telegram endorsed by Col. Grimm and was then given blanket permission by them also. Capt. Williams asked me for a copy of my surveyors report which I told him he could have only with my lawyers approval and on condition that he at the same time furnished us with a similar report of the ship at the same time. 1904.

We started the survey today. Mr. North, who is Lloyds surveyor was there at the same time as was also Mr. Reddick who is Mr. Flanagans corresponding number up here. But he is no Flanagan. 1905

In charge of the ship which is moored about 9 miles out of Brisbane at Pinkenbar, we found a Mr. Kemp, whom all the surveyors knew and admitted to be a good man. He has only been put in charge lately, but he is running several other jobs, some for the R. A. Navy at the same time. His present orders are to put the ship in such condition that she can under her own steam proceed to a dock in Sydney. I have not seen the surveyors yet and have only a vague idea of their findings. It will take them several more visits to see it all or even most of it and lot of it they will not be able to see for perhaps months yet.

1906 *Libelant's Trial Exhibit 45.*

Here are my own impressions:

A lot of cleaning work has been done on her and on the surface of things she does not look bad. But this is all. Of real work that will help to put her back in commission but very little has been done. They are cleaning up in engine room and fire room yet. If more work is not done on her then they seemingly intend to do they will not run far. She is still in my opinion a constructive total loss and I much doubt whether any underwriters would take the gamble of putting her back in 100 a-1 class, where she stood in Lloyd's.
1907 But honesty compels me to admit that she could at a good price ~~say 100,000~~ pounds Austr. be made into a serviceable ship which could be used for coasting or war purposes. To have the underwriters accept abandonment and partly reimbursing themselves by selling the ship to the Army would be the most sensible solution and by far the cheapest to all concerned.

To get my letter in the mail I shall have to wind up. More soon.

Yours

AXEL MICHELSON

1908

Libelant's Trial Exhibit 45.

Deposition Exhibit 43.

Brisbane Aug. 15, 1942.

Malleson Stewart & Co.
Queen Street, Melbourne.

Dear Sirs,

I sent you an air mail letter last night telling you about my first visit with my surveyors to the "*Portmar*" I have not seen the surveyors since. Indeed I do not know, when

I shall see them again. They are very busy working for all the services Australian and American. 1909

However, I feel, that what I told you, as being my opinion, of the future possibilities of the ship is very close to being right. Of her present condition there is no doubt. I am telling you just what I saw. I told you last night about the engine and fire room, and that hardly any real work tending to bring the ship back in commission had so far been done. There is indeed a lot more of dead work to be done before any real work can be started. The shaft alley is inaccessible. It is filled with so much fuel oil, mud, dirt and water, that you cannot get into it. How bad it is can best be imagined by telling you, that they were unable to disconnect any of the shaft couplings before they left Darwin and consequently had to drag a dead propeller 2000 miles. But no real determined effort could have been made. I believe I could have done it myself. The boat deck and forward bridge deck, with numerous shrapnel holes in them, have been further ruined by not having had any water on them for months in a tropical climate. At least the boat deck should, in my opinion be renewed. The radio station has been cleaned out. Besides a standard radio set, we had a last model short wave set put in just before we left San Francisco. We paid 6500 dollars for it. The ship has in short been cleaned out of everything, that could be moved, and as one of the party remarked, even of things that could not. All fire apparatus and life saving equipment is gone. So are all navigational equipment, tools, instruments, charts, books, clocks and accessories. Also all furnishings in all quarters which were not ruined by shell fire or water. Likewise all the Steward's stores of bedding, blankets, linen tableware, cooking utensils, galley, baker's and butcher's equipment. I shall here mention that the ice machine was put out of commission by shell fire. This puts the ship's refrigerating plant out of existence until expensive repairs or renewals have been made. A fire engineer's machine shop with first class machines 1910 1911

1912 *Libelant's Trial Exhibit 45.*

acetylene welding sets and tools is gutted of almost everything. Bosns stores, tools and equipment are gone. This includes all the best mooring lines, tarpaulins and spares, all new rope and wire, oils and paint. From the carpenter's shop all tools and moveables are missing. Hospital is cleaned of everything, medicine chest, medical and surgical stores, surgical kits, all equipment and accessories. Her steering engine—she has telemotor and steam steering gear—has been more or less wrecked. It seems by somebody too ignorant to disconnect it when they put her in
1913 hand gear for the tow down. The main items, structural damage to her hull and damage to engine, boilers and auxiliaries, I shall touch but lightly. Of the first you cannot on account of oil and dirt see anything to speak of yet and probably shall not be able to, until she is in dock and properly cleaned. Of the second I do not feel competent to speak.

They tell me that she makes very little water and that she is pumped only every second day. This would indicate that her bottom was not very much damaged. Could it perhaps be, that the bomb which was dropped immediately abaft her propeller could have opened up her stern bearing
1914 and caused her to leak there? This would explain the mess in her shaft alley. I noticed, I had indeed seen it before, that the same bomb blew away her rail aft, tore a quarter chock (mooring lead) off her and damaged her awning stanchions and frames.

I did not go down in her aft holds. Too much oil and dirt there to get round—let alone see anything. No. 2 and 3 did not look bad. There was coal there and a lot of dirt. Also in the lower hold rusty military barbed wire that prevented seeing her frames and sides, where they would most interest you—just forward of her deep tank.

No. 1 is loaded with salted hides which the salvage board had loaded in her in Darwin. They make the whole ship smell a lot worse than bad. They must be for Sydney, else I imagine, they would have been taken out long ago.

Libelant's Trial Exhibit 45.

While I think of it, I may as well mention, that more than half of the ship's standing and running cargo gear must be renewed on account of being cut up by machine gun fire.

If they are going to steam her out of here, it is a fair guess, that she will be here for months yet. Mr. Kemp of whom I spoke in my last letter told me that the Salvage Board had no priorities, and this morning I have been told that he and all his men have been temporarily taken off the ship to take care of a more pressing job for the Austr. Navy. The way it looked until today, it made me almost despair of getting to sea again. It looks a little better now. I shall explain further on. The only way I see of winding up this thing is for the owners underwriters and army to get together back in U. S. There seems to be no doubt, that the Army wants what is left of the Ship let the underwriters settle with my owners and then partly reimburse themselves by selling the ship to the Army, who in their turn could promptly settle with Capt. Williams. With the U. S. Army as the owner she would get priority and I dare say, she could in a reasonable time be made a serviceable ship. If she stays under the control of the Salvage Board, the time is not so far off when the Army will have nothing to show for the towage bill, which Capt. Williams states has been guaranteed by him. Time, dirt, rust and corrosion work against all of them although they do not seem to realize it.

I claim no credit for the above plan, but I could perhaps better afford to sponsor it than others. Unless something is done everyone will lose out. I hope that my owners will be the exception. If you approve of this you may suggest it to Mr. Warley. You may even, as far as I am concerned, consult—informally, Col. Plant about it. I have complete confidence in him playing a fair game with us or—with anybody.

And now about the thing of which I hinted above. Col. Grimm tells me that he needs a master for an American Ship. About the circumstances I know nothing. I told him

1918 *Libelant's Trial Exhibit 45.*

that nothing would please me more than to get a ship; but I told him also that I could not and would not leave my owners. He then asked me if I would take her if the Army got a temporary release for me from my owners, which I gladly promised him to do. So this is how things stand now. I doubt much that my owners would turn the Army down, and my prospects now are therefore better than for a long time.

If the thing goes in order I shall make a flying trip to Melbourne and temporarily turn the case of the "*Portmar*" over to you.

1919

Saturday afternoon Aug. 15th '42.

I have since writing the above received your letter of Aug. 13th but the one I sent you last night will have informed you that I now have the necessary permission. I have been trying to contact my surveyors to find out when I shall be able to get a preliminary report; but they are so busy that I have been unable to find out.

Monday Noon Aug. 17th 1942.

I have not yet been able to get a report from my surveyors. I have not even been able to see them. The following are my own figures and estimates. It will take better than 3 months and 100,000£ Austr. to make her into a serviceable ship and it will take 150,000£ Austr. and 5 months to put her back in Class. This is leaving out all salvage expenses. I have not over-estimated either time or cost.

1920

You may make any use of anything I have said in this letter to my owners or anyone else.

I wish you would—at deferred rates—send my owners as much of my report in this and my last letter and as much of my proposal for a settlement as you think necessary to give them a fair estimate of the situation. We shall try to set the ball rolling and keep it so until a settlement is reached.

Yours very truly,

Axel Michelson

Libelant's Trial Exhibit 46, 1921

Deposition Exhibit 44.

Written by himself

SS. *"Portmar"*

Preliminary by Lieut. Comm. A. G. Horne

DYNAMO ENGINES—Engines in fair order, generating sets were out of line of water, being installed on upper platform above main engines.

ARMATURES—Armatures were taken out of ship, dryed- 1922
out and tested and found in good order.

ELECTRIC WIREING—Wireing through ship in bad condition, ship need complete re-wireing.

Tanks under boiler. These tank tops have rusted through, in very bad condition.

AUXILLARIES—All gear and valves frozen up, pumps in bad order.

CONDENSER—Fouled on both steam and water side, needs thoroughly overhauling & cleaning

WINCHES—Very bad condition, also steam and Exhaust 1923
lines bad.

STEERING ENGINE & TELEMOTOR—Steering engine in fair condition, need a deal of attention, hand gear bevel wheels have been broken, these need new ones. Telemotor piping needs all overhauling, as it is in bad condition.

MAIN ENGINES—Engines had been submerged in salt water causing extensive corrosion in bearing journals etc. Dirt and oil had gone completely through engines, mud and sand and other abrazives, causing bearings—Pistons—valves etc to seize, link motion, eccentric and gear frozen up. Engines require extensive overhaul.

SHAFTING—Crank shaft was disconnected abaft No. 6 bearing and found to be 40/1000 out of alignment, it ap-

1924 *Libelant's Trial Exhibit 47.*

pears that ship has been strained, causing this faulty alignment.

Only tank top under boiler inspected, after tanks tops had not been cleaned, still covered with oil & mud.

THRUST—Needs remetalling, and thoroughly cleaning out, it is in fair order.

TUNNEL SHAFTING—Seized in bearings and out of alignment, journals and shaft pitted.

BOILERS—Boilers examined externally and found to be in
1925 fair condition. Boiler mountings in bad condition owing to salt water, sand - mud etc covering them. One boiler only (Centre) was examined internally, this boiler was found in fair condition; All stays & tubes were tested, also combustion chambers. Port & Starboard boilers not opened up at time of inspection.

Libelant's Trial Exhibit 47.

Deposition Exhibit 45.

1936 SURVEY REPORT

R. Douglas Taylor
Marine Surveyor
Claims Adjuster
Ship Valuator
Measurer and
Compass Adjuster
Brisbane
Cable Address "Rolyat"
Codes Used: A. B. C. 5th Edition
Telephone B 6435

Surveyor to
the
British Corporation Registry.
American Bureau of Shipping
Det Norske Veritas

SS. *"Portmar"*

Date of Survey started 14/8/'42.

THIS IS TO CERTIFY that we the undersigned Marine Surveyors did at the request of Captain Axel Michelson (Master) and Messrs. Dalgety & Co. Ltd., of Brisbane

Libelant's Trial Exhibit 47.

(agents) attend on board the American Steel single screw Steamship "*Portmar*" of New York, Off. No. 219283, and 5550 gross tons, lying afloat at the Government Railway Wharf at Pinkenba and later at the Milling Co's Wharf, South Brisbane, on the 14th day of August, 1942, and subsequent dates, for the purpose of surveying said steamer on behalf of the above named Master and the Owners, the Calmar Steamship Corporation of 25 Broadway, New York, N. Y. U. S. A.

From our interview of the Master and examination of his Log Book and extended protest noted in Melbourne Vic. on the 2nd. day of April, 1942, it would appear, that the steamer on the 15th and 16th days of February this year, while in a convoy in the Timor Sea, and more especially on the 16th of February, was heavily bombed by enemy bombers, and that on that date twenty three heavy bombs were dropped in the immediate vicinity or very close to the vessel, and that the ship again on the 19th of February, while anchored in Port Darwin, was attacked by enemy aircraft and then so severely damaged by concussion from bombs, machine gun and cannon fire, that she could no longer be kept afloat, but was by the Master run into shallow water where she foundered. More than half the ship from the bridge to the stern including engine and boiler rooms being submerged at high water twice daily. Eventually after being so submerged for two months, more or less, the hull was made tight, pumps fitted and the water pumped out. After the ship had been floated she was towed from Darwin to Brisbane by one or more tugs. She arrived at Brisbane about noon on 27th July, and was made fast to the wharf at Pinkenba. Later on, or about 16th of August, she was moved to wharf in South Brisbane as above named. For further particulars up to and including Feb. 19th see Log Book and extended protest.

On the 14th of August, 1942, we commenced this survey. No other repairs or improvements to the vessel from the time she foundered until we first boarded her, seem to have

1930 *Libelant's Trial Exhibit 47.*

been effected than the plugging up of the holes in the shell plating. Most of the cargo had been taken out, but at least a small quantity of the original cargo was left, while it would seem, as if coal had been taken in in No. 2 Hold and salted hides in No. 1, before she left Darwin on her tow to this port.

As the steamer is not, and cannot in this port be placed in dry dock, a complete survey will be impossible. It has indeed been extremely difficult to make any survey at all on account of fuel oil, mud and filth covering nearly every
1931 part of the vessel, which has been submerged. Although no draft marks can be read the ship appears at the present time to be in a trim of about 10 feet forward and 14 feet aft without any list.

With most of the hull on the starboard side below the wharf this side cannot be closely examined. No sign of damage could be seen on the upper and exposed part of shell plating. On the port side of the hull we counted 81 holes caused by machine gun and cannon fire. As each hole could not be marked when counted, there is the possibility of the number being slightly in error, up or down. These holes were all between fire room bulkhead and aft peak
1932 bulkhead opening into fire room, engine room and No. 4 and 5 Holds. The holes were various sizes and shapes from the size of a heavy caliber machine gun bullet to ragged, irregular shell holes 5 to 7 inches across. In the third range from sheer strake and the eighth plate from aft we counted 16 holes small and large. A number of plates on the port side have been set in, presumably by concussions. Forward of the bridge little damage seems to have been sustained by the shell plating.

From the appearance of the hull, as well as from the Master's statement, it seems that the ship while partially sunk has only rested on her starboard side aft with a heavy list to port and with the forward end of the ship always afloat and rising and falling with a range of tide of nearly 30 feet, a position which would have put a severe strain on the whole structure of the hull.

1933

The Decks in their whole length show marks of enemy fire. The steel decks for'd and aft have perforations and dents from machine gun fire, also the poop where rails, chocks and leads have been shattered or torn off. On the poop the mooring telegraph was destroyed while the sounding machine was cut off in the middle of the column and blasted away with no signs left of it. Steam pipes on the forward main deck have been cut and perforated. The boat and bridge decks (wooden decks) have in numerous places been holed and splintered and engine room skylight, and fiddley top riddled by machine gun fire, so also has 1934
funnel, fire room and engine room ventilators. The forward bridge deck and flying bridge has numerous machine gun bullet holes. Both the standard and steering compasses were destroyed by gun fire, also one of the engine telegraphs and the ships morse signalling apparatus.

The rigging and cargo gear has been badly cut up by machine gun fire, and all cargo booms with the possible exception of the No. 1's show bullet holes and tears. Three of the booms, the port No. 3 and 4 and starboard No. 5 had their topping lifts cut by gun fire, crashed to the deck and thereby caused further damage, the No. 4 carrying away ladder to boat deck and damaging the radio house, the Nos. 3 and 5 carrying away permanent awnings and awning 1935
spars.

The deck houses have been holed by gun fire, but most damage to deck houses seem to have been caused by concussion from bombs dropped immediately alongside of the ship. All quarters and accomodations in both forward and midship deck houses were found completely demolished and shattered. Ceiling, panelling, wainscoting and doors having in most of the quarters been blasted or torn out of their places and all furniture, lockers, cabinets and shelves shattered in all directions. The radio house, which also contained the hospital has been blasted off its foundation and parts of its sides blown out. The wheel house although in a much less degree than the radio house shows damage from concussion.

1936 *Libelant's Trial Exhibit 47.*

Crews quarters aft under the poop with all the fittings and furnishings therein are damaged beyond repair by fuel oil and by long submersion in muddy water.

No. 1 Hold and tween deck could not be surveyed on account of cargo therein.

No. 2 Hold and tween deck appeared to be in fair condition but could not be minutely surveyed.

In Nos. 4 & 5 Holds and tween decks all wood work, ceiling on tank tops, cargo battens and hatches, were found damaged beyond repair by fuel oil, sides, bulkheads tank
1937 tops and bilges all covered and filled with fuel oil and mud.

Forward part of shelter deck found in fair condition while the aft part which on the port side contains the ice machine room, refrigerating room and chilling chamber besides a domestic water tank, could not on account of fuel oil and filth be properly surveyed. It could be seen, however, that all wood work and insulation in refrigerating room and chilling chamber had been damaged beyond repair. The ice machine has been damaged by gun fire, but the extent of the damage cannot be ascertained before a clean-up has been made. In the aft end of the shelter deck on the starboard side is the engineer's machine shop and another
1938 domestic water tank. With the exception of stationary benches and a lathe the machine shop has been emptied of everything in the line of tools, machines, electric drills and an acetylene welding outfit which the shop, according to the Masters statement, contained.

All anchors and chain cables as specified in the Ships Inspection Certificate were seen on board ship. Starboard bower anchor with two shots of chain was found on starboard side of main deck forward, and a kedge anchor was hanging over starboard side amidships.

The condition of the engine room and fire room, which have been for about two months filled with muddy and oily salt water twice daily was such as to make a complete survey in detail of engine, boilers and auxiliaries impossible.

Libelant's Trial Exhibit 47.

Main engine showed extensive corrosion in bearings, journals, etc. dirt and oil have gone completely through engines, mud, sand and other abrasives causing bearings, pistons and valves to seize. Link motion, eccentrics and gear frozen up. Engines will require very extensive overhaul and repair. 1939

Thrust needs thorough cleaning, overhaul and re-metalling.

Crank shaft was disconnected abaft No. 6 bearing and found to be 40/1000 out of alignment. It appears ship has been strained, causing this faulty alignment. 1940

Tunnel shafting seized in bearings and out of alignment, journals and shaft pitted.

Boilers examined externally and found to be in fair condition. Boiler mountings are in bad condition owing to salt water and mud. One boiler only—the centre one—was examined internally. This boiler was found in fair condition. All stays and tubes were tested, also combustion chambers.

Port and starboard boilers not opened up at time of inspection.

Tank tops under boilers almost corroded through and in very bad condition. These were the only tank tops which were, or could on account of conditions, be examined. 1941

Condenser fouled on both steam and water sides, needs thorough cleaning and overhauling.

Auxiliaries: All gear and valves frozen up. Pumps in bad order. Dynamo engines in fair order, generating sets were above water line being installed on upper platform above main engine.

Armatures were taken out of ship, dryed out and tested and found in fair order.

Electric wiring throughout ship in bad condition. Ship needs complete re-wiring.

Winches and deck machinery in very bad condition, steam and exhaust lines also.

Steering engine found with hand gear bevel wheels broken, otherwise in fair condition.

1942 *Libelant's Trial Exhibit 47.*

Telemotor piping is in bad condition and needs thorough overhauling.

In the navigating department nothing was found of compasses, clocks, instruments, tools, charts, books or indeed anything necessary for the navigation of a ship.

With the exception of an old instrument frame all radio apparatus was found missing. The radio direction finder has been completely ruined and gutted of all its essential parts.

No fire apparatus or life saving equipment of any kind
1943 and belonging to the ship has been found on board, even boat davits have been damaged, with boat falls either missing or destroyed. Four, more or less, damaged lifeboats were indeed seen on the ship (two in No. 4 tween deck) but all had previously belonged to other ships.

With the exception of the lines and wires actually used in mooring the ship to the wharf and seven tarpaulins, no Mate's, Bos'n's or carpenter's stores or equipment were found on board.

In the Steward's department, with the exception of a damaged galley stove, no stores or equipment were found. Nothing in the line of bedding, blankets, linen, tableware,
1944 cooking utensils, galley, bakers or butchers equipment found on board.

We have by the Master been asked to give our estimate of cost and time to give the s.s. "*Portmar*" such repairs as would regain for her her former Classification. We estimate this cost to be approximately £120,000 Australian. (One hundred and Twenty Thousand Australian Pounds). This does not include any salvage expenses or expenses of any kind incurred by ship prior to our survey. It is to be understood that this is only a fair estimate of cost of such damage as we have seen and that further examination of the ship in dry dock may reveal damage which could not be included. It must also be kept in mind that the ship cannot be repaired in this port and that considerable expenses will be incurred in order to bring the ship to a final port of repair. Such

Libelant's Trial Exhibit 48.

expenses we have included. In giving the estimate we have given consideration to present high cost of labour and materials and we have also made comparisons with costs of near similar cases.

As to the time element we cannot under present conditions give an opinion. It would under the best of condition require months.

Given by us at Brisbane this 19th day of September, 1942.

R. DOUGLAS TAYLOR,
Marine Surveyor.

A. G. HORNE,
Marine Surveyor.

(ENVELOPE)

OFFICE OF NAVAL ATTACHE
MELBOURNE, AUSTRALIA

(stamp)
Washington, D. C. 9
Oct 21
6 30 P M
1942

Passed by Naval Censor

H. W. Warley Esq.,
President
Calmar Steamship Corporation
25 Broadway
NEW YORK

If Not Delivered Within Seven Days, Return to
46 QUEEN STREET, MELBOURNE, C.1.

Libelant's Exhibit 48.

Captain Michelson's account of disbursements with vouchers annexed. To be separately submitted to the Court.

1948

Libelant's Trial Exhibit 49.

Deposition Exhibit Underwriters A.

Copy.

LLOYD'S REGISTER OF SHIPPING.

(Lloyd's Register of Shipping)
Port Sydney. N. S. W.

15th February 1943.

This is to Certify that A. J. McCowan & Jas. C. Erskine
1949 the undersigned Surveyors to this Society did at the request of Messrs. Port Line Ltd., Lloyd's Agents, attend upon the S.S. *"Portmar"*, 5551 tons gross, of New York, afloat at Brisbane on the 3rd September 1942 and subsequently after her arrival at Sydney 24th November 1942, for the purpose of examining the vessel for damage stated to have been caused by enemy action in February 1942.

From extracts of Protest by the Master, Captain Axel Michelson and from information supplied it would appear that on the voyage from Darwin to Koepang, Timor, the vessel was attacked by enemy aircraft on the 15th & 16th February 1942, that after returning to Darwin on the 18th February she was again attacked in that port and sustained
1950 considerable damage which in the opinion of the Master made it necessary to beach the vessel, as the machinery spaces and after holds were flooded.

The vessel was subsequently refloated and towed to Brisbane by arrangements between the U. S. Army and the Commonwealth Salvage Board.

(These signatures on 3 of 4 pages.) (sgd.) A.J.McC.
" J.C.E.
" D.S.C.

This Certificate is issued upon the terms of the Rules and Regulations of the Society, which provide that:

"While the Committees of the Society use their best endeavours to ensure that the functions of the Society are properly executed, it is to be understood that neither the Society nor any Member of any of its Committees is under any circumstances whatever to be held responsible for any inaccuracy in any report or certificate issued by the Society or its Surveyors, or in any entry in the Register Book or other publication of the Society, or for any error of judgment, default or negligence of any of its Committees or any Member thereof, or the Surveyors, or other Officers or Agents of the Society."

Libelant's Trial Exhibit 49.

The work of reconditioning and repairs was carried out as far as practicable at Brisbane and the vessel then proceeded to this port, under her own power, for dry docking and completion of repairs; sufficient to make her seaworthy and serviceable for the requirements of the United States Army Authorities.

For particulars of the work carried out at Brisbane, see Reports issued by Lloyd's Register Surveyor at that port dated 29/9/42 and 19/11/42.

For particulars of the damage found in dry dock at Sydney, see Report issued by Lloyd's Register Surveyor at this port dated 13/1/43.

In compliance with instructions, the undersigned attended on board the vessel from time to time and, in making survey of the damage and of the repairs being effected, conferred with Mr. D. S. Carment, Associate Naval Architect of Messrs. Cockatoo Docks & Engineering Co. and Messrs. Howell & Gibson, Surveyors for the American Bureau of Shipping, with a view to agreeing upon the extent and cost of repairs allocated—without prejudice—against enemy action damage, wear and tear, alterations and additions, etc.

The accounts shown in the attached statement have been checked and, under present conditions obtaining at Australian ports, are considered reasonable.

Their allocation under the separate headings is concurred in and, adopting these figures, it is considered that:—

(1.) The cost of all damage repairs necessary to restore the "*Portmar*" to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000, Australian Currency, which figure includes the amounts to cover outstanding items mentioned in clause 3(d).

(2.) The cost of all repairs effected at Brisbane and Sydney to recondition the vessel in the manner specified by

1954 *Libelant's Trial Exhibit 49.*

the United States Army would amount to approximately £34,000 (Australian Currency.) This figure includes damage by enemy action, alterations and additions., defence equipment and wear and tear repairs, as per attached statement, and additional accounts yet to be rendered.

(3.) (a) In determining the above costs the accounts submitted by the United States Army have been examined and are considered reasonable under present conditions.

(b.) The value of materials and supplies utilised in
1955 reconditioning the vessel and obtained from S.S. *"Rufus King"* is—as shown in attached statement—£3170. 17. 3.

(c.) The only damage repairs now effected which might be considered inadequate for reinstating the vessel to the same condition as she was prior to being bombed in the Timor Sea in February 1942, are the welding of plate patches over the holes in shell plating, decks etc. The cost of this work as carried out at Brisbane would be in the vicinity of £600.

(d). The cost of outstanding repairs to vessel's bottom in dry dock as detailed in Sydney Report dated 13/1/43
1956 would amount to approximately £2000.

The cost of repairing the damaged shell and deck plating in such a manner as to cause no disfigurement to, or depreciation in the value of the ship and reinstate these parts in as good a condition as before the damage, would amount to approximately £1500.

With reference to the attached statement of costs, it is understood that additional accounts for repairs effected are yet outstanding.

These are as hereunder:

(1) Wireless installation, estimated at approx. £1250.

(2) Three lifeboats " " " £1500.

Libelant's Trial Exhibit 49.

(3) Top mast back stays (ex "Westralia") estimated at approx. £17.

(4) Bullivant wires etc. estimated at approx. £123.

(5) 15 K. W. generating set for wireless estimated approx. £450.

All the above figures are in Australian Currency, items 1 and 2 being allocated against damage by enemy action and items Nos. 3, 4 and 5 allocated to alteration and additions. The estimated cost of these items are included in the totals given above and their allocation is also concurred in without prejudice to any subsequent adjustments.

(sgd.) A. J. McCowan
" Jas. C. Erskine
Surveyors to Lloyd's Register.

We concur with the above report and attached statement.

(sgd.) D. S. Carment
Associate Naval Architect
Cockatoo Docks & Eng. Co. Pty. Ltd.

(sgd.) W. Y. Howell
Surveyor for
The American Bureau of Shipping.

1960

Libelant's Trial Exhibit 49.

SUMMARY OF EXPENDITURE INCURRED FOR RECONDITIONING SS. "PORTMAR"

WORK CARRIED OUT AT BRISBANE

Item No.	Source of Account	Cost of Damage Due To Enemy Action	Cost of Alteration & New Equipment	Cost of Defence Equipment	Cost of Repairing Due To Fair Wear & Tear Ships Account	Total
1	Evans Deskin & Co., Ltd. (Less £70.0.0 allowed for machine tools deducted from Ships account)	£ 4941.10.11	£ 604. 2.10	£ 852. 1. 8.	£ 180.18. 8.	£ 6578.14. 1.
2	Geo. Gilbert Elec. & Mach. Engineers	£ 609.13. 3	—	—	—	£ 609.13. 3.
1961 3	Petroleum Depot Supplies	£ 566. 5. 1.	—	—	—	£ 566. 5. 1.
4	Medical Supplies	£ 35.15. 0.	—	—	—	£ 35.15. 0.
5	U. S. Salvage Depot	£ 70. 0. 0.	—	—	—	£ 70. 0. 0.
6	Australian Salvage Corps	£ 300. 4. 4.	—	—	—	£ 300. 4. 4.
7	U. S. Signal Corps Supplies	£ 6.10. 0.	—	—	—	£ 6.10. 0.
8	Quartermaster Stores Hedley Park	£ 441. 8. 9.	—	—	—	£ 441. 8. 9.
9	Supplies obtained by Local Purchase B. S. 3	£ 1169.14. 0.	—	—	—	£ 1169.14. 0.
10	Berthage Account John Burke	£ 75. 1. 0.	—	—	—	£ 75. 1. 0.
11	Berthage Account Newstead Wharf	£ 167. 8. 9.	—	—	—	£ 167. 8. 9.
12	For Water Supplies by Brisbane Milling Co.	£ 36.19. 0.	—	—	—	£ 36.19. 0.
13	Macdonald Hamilton & Co. for Tugs & Watchman's Wages	£ 71.11. 6.	—	—	—	£ 71.11. 6.
14	Fish Steam Laundry De Oiling & Cleaning Laundry	£ 116. 0. 2.	—	—	—	£ 116. 0. 2.
1962 15	Hire of Passenger Gangway Aust. United Steam Nav. Co.	£ 4. 0. 0.	—	—	—	£ 4. 0. 0.
16	Evans Deakin & Co., Ltd.	—	—	—	£ 15. 7. 2.	£ 15. 7. 2.
17	U. S. War Shipping Administration Engineers Services	£ 544.17. 3.	—	—	—	£ 544.17. 3.
18	Military Personnel (Wages)	£ 3663.12.10.	—	—	—	£ 3663.12.10.
19	Estimated Value of Equipment & Stores X Rufus King	£ 1830.17. 3.	£1204.10. 0.	£ 135.10. 0.	—	£ 3170.17. 3.
20	A. U. S. N. for repairs prior to 10th September 1942.	£ 3191.15. 1.	—	—	—	£ 3191.15. 1.

WORK CARRIED OUT AT SYDNEY

21	Wilson & Stoneham Engineering Co.	£ 4.19. 6.	—	—	£1917.17. 4.	£ 1922.16.10.
22	Morts Dock & Engineering Co., Ltd.	£ 790.17. 6.	£ 43.10. 0.	—	£ 293.13. 1.	£ 1128. 0. 7.
23	Beat Bros. Pty. Ltd.,	£ 1351. 6. 5.	£ 179.17. 9.	£ 399. 8. 0.	£ 56.18. 6.	£ 1987.10. 8.
24	Charmichael Bros.	£ —	—	—	£1343. 6. 9.	£ 1343. 6. 9.
25	Brights Dock	£ 753.13. 7.	£ 502. 9. 1.	£ 552.14. 0.	£ 703. 8. 8.	£ 2512. 5. 4.
26	Fox & Lawson	£ 351. 0. 7.	£ 58.11.10.	£ 86.14. 4.	£ 320. 4. 6.	£ 816.11. 3.
		£21095. 1. 9.	£2593. 1. 6.	£2026. 8. 0.	£4831.14. 8.	£30546. 5.11.

W. Y. Howell
Surveyor for
The American Bureau of Shipping

D. S. Carment
Cockatoo Docks

A. J. McCowan
Surveyor to Lloyd's Register

1963

Libelant's Exhibit 50.

Deposition of Joseph E. Bullock, Chief Officer of S.S. *Portmar*, printed at pp. 449 to 512.

Libelant's Exhibit 51.

Excerpts from testimony of Axel Michelson, Master of S.S. *Portmar*, taken in Calmar's suit against United States in the Court of Claims, printed at pp. 513 to 540.

1964

Libelant's Trial Exhibit 52.

From

37° 45′ N through
122° 41′ W

32° 30′ N
129° 30′ W

22° 50′ N
140° 00′ W

1965

13° 50′ N
149° 40′ W

3° 45′ N
160° 00′ W

6° 00′ S
170° 45′ W

11° 50′ S
180° 00′

12° 50′ S
166° 30′ E

15° 25′ S
157° 30′ E

1966 *Libelant's Exhibit 53.*

12° 10′ S
148° 10′ E

5° 35′ S
130° 00′ E

6° 00′ N
123° 05′ E
to
destination.

1967

Libelant's Exhibit 53.

Chart showing proposed voyage according to Naval Orders, and actual route taken by S.S. *Portmar*. To be separately submitted to the Court.

Libelant's Exhibit 54.

(Complete exhibit to be separately submitted to the Court.)

1968 Syndicate monthly schedule of War Risk Rates, time and trip, to become effective 2/15/42. These rates to be in force subject to acceptance prior to 5 p.m. E.S.T. 2/13/42 and apply to sailings prior to 12:01 a.m. E.S.T. 3/1/42.

2/10/42

Voyage	Time Limit.	Rate
• • • • • •		
(27) U. S. Atlantic to Australian Ports and return		7½%
(28) U. S. Pacific to Australian Ports and return		6½%

United States Exhibit A.

NAVY DEPARTMENT

November 25, 1941

From: Commandant, Twelfth Naval District and Naval Operating Base, San Francisco, California.

To: The Master, S.S. *Portmar.*

Subject: Routing Instructions.

Enclosures: 1. General Instructions.

2. Special Warning No. 132 (Manila Bay)

3. Special Warning, Western Part Torres Straits.

Ship's Data: Speed of advance 10 knots.
Leaving San Francisco, Fuel for 70 days.
Leaving San Francisco, Water for 30 days.
With evaporators working, it is presumed water supply will be ample for entire voyage.

Note: Fresh water obtainable at Suva, Port Moresby and Amboina Island.

Gross Tonnage, 5550.

Voyage No. 39.

1. In accordance with your sailing instructions from the Calmar Steamship Company on November 27, 1941 and when ready for sea, you will sail from San Francisco for Manila, P.I., via Torres Straits, Molukka Passage, Bangka Passage and Basilan Straits. Pilots are now available at Port Moresby for vessels westbound through Torres Straits. Masters desiring the services of a pilot will make arrange-

ments at a U. S. Navy Routing Office or with a Naval Observer before departing from the last port of call.

2. Pass through the following named points:

IRON	—Latitude	Longitude
STEEL	—Latitude	Longitude
LEAD	—Latitude	Longitude
ZINC	—Latitude	Longitude
ALUM	—Latitude	Longitude
NICKEL	—Latitude	Longitude
1973 BRASS	—Latitude	Longitude
GOLD	—Latitude	Longitude
METAL	—Latitude	Longitude
BURR	—Latitude	Longitude
SLACK	—Latitude	Longitude

The master is responsible for the safety of his ship and will adjust the courses between the above named positions to avoid navigational dangers.

3. Maintain radio silence at sea except for:

a. Cases of real emergency affecting the safety of
1974 the ship. Use forms of procedure given in CSP 937 if applicable to the emergency.

b. Messages necessary for the purpose of making contact with Naval escort.

4. Darken ship after passing 160° 00′ West.

5. In the event it becomes necessary to call at Suva, Fiji Island, contact the U. S. Naval Observer and request him to advise the U. S. Naval Attache at Melbourne of your expected date and hour of arrival off Port Moresby.

1975

6. Upon arrival at Manila turn in these routing instructions to the Port Director, Naval Transportation Service and obtain a receipt.

J. W. GREENSLADE
Commandant.

T. D. Ross
By Direction.

Received:

AXEL MICHELSON,
Master.

1976

Copies to: (Less Enclosure 2 & 3)

(2) Chief of Naval Operations.
(1) Commander-in-Chief, Pacific Fleet.
(1) Commander-in-Chief, Asiatic Fleet.
(1) Commandant, Fourteenth Naval District.
(1) Commandant, Sixteenth Naval District.
(1) Port Director, (NTS) Manila, P.I.

1977

(2) Naval Observer, Wellington, N.Z.
(1) Naval Observer, Suva, Fiji Islands.

GENERAL INSTRUCTIONS SS *Portmar*—VOY. #39
Enclosure #1

1. The master is reminded that he is at all times responsible for the safe navigation of his ship.

2. Provide for the security of routing instructions and other secret or confidential papers or publications on board. Do not allow unauthorized persons to have access to them.

1978 *United States Exhibit A.*

3. If it becomes necessary to alter your route while at sea, it will be done with reference to one or more of your named positions. An example of such a use is:

"Pass one hundred miles North of position IRON".

4. When in company with a Naval Escort the senior officer of such escort is responsible for sending and receiving all radio messages. No radio messages will be sent without his authority.

1979 5. If at any time during your voyage it appears probable that your ship might be searched by Axis ships, destroy these routing instructions and all secret and confidential codes and publications in your possession.

6. *Should war start while on your voyage:*

(A) *If in Port,* act in accordance with CSP 937, paragraphs 3 (a), 3 (b) and 22. If in a foreign port, the U. S. Consul should be consulted before proceeding to sea.

(B) If at Sea:

1980 (a) Darken ship from sunset to sunrise. It is suggested that you have the ship inspected frequently to see that no lights are showing.

(b) If it is possible that submarines are present, zigzag during daylight, twilight, and on bright moonlight nights.

(c) Collect and destroy all newspapers on board, as in the event of capture, raiders often obtain valuable information from them.

(d) *Watch for war warnings.*

(e) Strict radio silence must be maintained at sea, except to make reports of the enemy or distress messages. See CSP 937 on the use of radio and the messages which can be sent.

1981

(f) If in danger of capture or destruction, destroy your routing instructions and all secret or confidential papers and publications in your possession. Routing instructions must on no account be allowed to fall into the hands of the enemy.

United States Exhibit B.

7 DECEMBER 1941

1982

FROM: RDO HONOLULU/RDO CAVITE
TO: ALL MERCHANT SHIPS

WAR EXISTS BETWEEN UNITED STATES AND JAPAN XX PROCEED CLOSEST US OR FRIENDLY PORT IMMEDIATELY

United States Exhibit C.

1983

11 DECEMBER 1941

FROM: COM TWELVE
TO: ALL MERCHANT SHIPS PACIFIC

MASTER OF FOLLOWING SHIPS MAUNALOA HARRYLUCKENBACH JANECHRISTENSEN PORTMAR X PROCEED SUVA FOR FURTHER INSTRUCTIONS

1984

United States Exhibit D.

Certified duplicate original extracted from record on file at US Coast Guard Headquarters.

EDW C CLEAVE
Capt. EDW. C. CLEAVE, USCG
Chief, Merchant Vessel Inspec. Div.

N.C.G. 2692
(Rev. Sept. 1941)

Form 924
Department of Commerce
Bureau of Marine Inspection and Navigation
(Rev. Sept. 1941)

1985

Report of Marine Casualty (or Accident)

(20 Stat. 164, 18 Stat. 125-128, 38 Stat. 1184; R. S. 4405, 4448, 4450; 14 U. S. C. 91; 33 U. S. C. 361, 362, 363, 365, 366; 46 U. S. C. 375, 234, 239)

Date submitted 26 March, 1943.

Customs District San Francisco.

U. S. Local Inspectors, Port of San Francisco.

1986

1. Name of vessel "*Portmar*".

2. (*a*) Nationality American.

(*b*) Rig Steam Screw.

(*c*) Official No. 219 283.

3. Type of vessel and trade or service Cargo-Freight.

4. Home port, or port where numbered, if motorboat New York.

5. Gross tonnage (070) 5550.

6. Year built 1919.

United States Exhibit D. 1987

7. Hull materials Steel.

8. Name and residence of master Axel Michelson 2306 Waverly St., Oakland, Calif.

9. Name and residence of owner (or agent) Calmar Steamship Corporation 25 Broadway New York.

10. Date and port of last inspection October 1941 Baltimore, Md.,

11. Radio equipment of vessel: Telephone or telegraph. 1988

12. Last port of departure San Francisco.

13. Date of departure Nov. 27, 1941.

14. Where bound Manila, P. I.,

15. (*a*) Number of passengers (0800) 3.

(*b*) Number of crew (0900) 35.

(*c*) Number of others no.

16. Estimated value of vessel (1200), $ unknown. 1989

17. Value of cargo (1300), $ unknown.

18. Any deck load? Yes.

19. Weight of cargo (long tons) Aprox. 2500.

20. Nature of cargo Military supplies and equipment.

21. Date and exact time of casualty (specify time standard) Feb. 19, 1942 2:12 P.M.

22. Exact locality of casualty: Lat. 12° 34′ S Long. 130° 52′ E Or distance and bearing (true) from charted object when applicable (160)

1990 *United States Exhibit D.*

23. Nature of casualty (check one or more of the following—see Note 1):

- ☐ Foundering .....(1701)
- ☐ Stranding .....(1702)
- ☐ Grounding .....(1702)
- ☐ Collision with vessel (give name and hailing port of colliding vessel) .....(1703)
- ☐ Fire .....(1705)
- ☐ Engine or machinery trouble .....(1706)
- ☐ Capsizing .....(1707)
- ☐ Collision with object other than vessel or ice (name object) ....(1708)
- ☐ Collision with ice..(1709)
- ☐ Masts, sails, and other equipment damage .....(1711)
- ☐ Waterlogged, leaking, etc. .....(1714)
- ☐ Heavy weather damage .....(1715)
- ☒ Loss or damage from air raids.....(1716)
- ☐ .....( )

1991

24. Cause of casualty (explain fully) Japanese air attack .....(18)

25. Wind direction and force, weather, sea, and visibility West NW 2—Weather fine—Sea slight visibility good.

1992

26. Number lives lost: (*a*) Passengers (1000) ?

(*b*) Crew (1100) 1

(*c*) Others.....

27. Number persons injured: (*a*) Passengers ?

(*b*) Crew 10.

(*c*) Others .....

28. Estimated loss or damage—to vessel (see note (2)) (1400), $450,000. Aprox.; to cargo (1500), $?

29. Amount of insurance—on vessel, $? ; on cargo, $?

United States Exhibit D.

1993

30. State in detail measures taken to avoid casualty:

(*a*) Navigation, piloting, and use of navigational aids Beached vessel to avoid sinking.

(*b*) Communications .....

31. By whom and to what extent assistance was rendered:

(*a*) Communications (name stations) .....

(*b*) U. S. Coast Guard (name vessels, stations, units, etc.) .....

1994

(*c*) Other means (vessels, etc.) .....

32. Was auto-alarm signal transmitted by your vessel?

33. Did casualty result from the presence of explosives, inflammables, or other dangerous cargo? (For definition of above see "Explosives or Other Dangerous Articles on Board Vessels" containing the regulations prescribed by the Secretary of Commerce, April 9, 1941) No.

34. Remarks (include names of those who lost their lives, if any): Thomas Tyrrell, A.B.

1995

(Signed) AXEL MICHELSON
Title Master

Subscribed and sworn to before me, an officer authorized to administer oaths, this 26th day of March, 1943.

Signed S. A. KENNEDY
Title Hearing Officer

[SEAL]

* See instructions below stating when form must be sworn to. (Filing instructions omitted.)

1996

United States Exhibit E.

Certified true photostatic copy of original on file at U. S. Coast Guard Headquarters.

EDW. C. CLEAVE
Capt. EDW. C. CLEAVE,
Chief, Merchant Vessel Inspection Div.

N.C.G. 2692
(Rev. Sept. 1941)

Form 924
Department of Commerce
Bureau of Marine Inspection and Navigation
(Rev. Sept. 1941)

1997

Report of Marine Casualty (or Accident)

(20 Stat. 164, 18 Stat. 125-128, 38 Stat. 1184; R. S. 4405, 4448, 4450; 14 U. S. C. 91; 33 U. S. C. 361, 362, 363, 365, 366; 46 U. S. C. 375, 234, 239)

Date submitted: July 6, 1942.

Customs District No. 10.
U. S. Local Inspectors, Port of New York.

1. Name of vessel *"Portmar"*.

1998 2. (*a*) Nationality U. S. A.

(*b*) Rig Steam.

(*c*) Official No. 219283.

3. Type of vessel and trade or service Single screw cargo.

4. Home port, or port where numbered, if motorboat New York.

5. Gross tonnage (070) 5550.

6. Year built 1919.

7. Hull materials Steel.

United States Exhibit E.

1999

8. Name and residence of master Axel Michelson, 2306 Waverly St., Oakland, Calif.

9. Name and residence of owner (or agent) Calmar Steamship Corp., 25 Broadway, New York City.

10. Date and port of last inspection October 9, 1941, Baltimore, Md.

11. Radio equipment of vessel: Telephone or telegraph —telegraph.

2000

12. Last port of departure Darwin, North Australia.

13. Date of departure February 14, 1942.

14. Where bound Koepang, Timor, but returned to Darwin because of Enemy attack—arriving about noon February 18.

15. (*a*) Number of passengers (0800) .....

(*b*) Number of crew (0900) 35.

(*c*) Number of others about 300 soldiers.

2001

16. Estimated value of vessel (1200), $860,000.

17. Value of cargo (1300), not known.

18. Any deck load? Yes.

19. Weight of cargo (long tons) unknown.

20. Nature of cargo Gasoline and Military Equipment of the Field Artillery aboard.

21. Date and exact time of casualty (specify time standard) February 19th, 1942.

2002 *United States Exhibit E.*

22. Exact locality of casualty: At Port-Darwin, North Australia in a small cove southward of Channel Island. (160)

23. Nature of casualty (check one or more of the following—see Note 1):

- ☐ Foundering .....(1701)
- ☐ Stranding .....(1702)
- ☐ Grounding .....(1702)
- ☐ Collision with vessel (give name and hailing port of colliding vessel .....(1703)
- ☐ Fire .....(1705)
- ☐ Engine or machinery trouble .....(1706)
- ☐ Capsizing .....(1707)
- ☐ Collision with object other than vessel or ice (name object) ....(1708)
- ☐ Collision with ice..(1709)
- ☐ Masts, sails, and other equipment damage .....(1711)
- ☐ Waterlogged, leaking, etc. .....(1714)
- ☐ Heavy weather damage .....(1715)
- ☒ Loss or damage from submarines, air raids, mines .....(1716)
- ☐ ——— ( )

2003

2004

24. Cause of casualty (explain fully) Bombing, machine gunning from Enemy Planes.

25. Wind direction and force, weather, sea, and visibility, weather clear, sea calm, visibility good.

26. Number lives lost: (*a*) Passengers (1000).....

(*b*) Crew (1100) One.

(*c*) Others not known.

27. Number persons injured: (*a*) Passengers

(*b*) Crew Twelve.

(*c*) Others not known.

28. Estimated loss or damage—to vessel (see note (2)) (1400), $860,000; to cargo (1500), not known.

29. Amount of insurance—on vessel, $860,000; on cargo, not known.

30. State in detail measures taken to avoid casualty:

(*a*) Navigation, piloting, and use of navigational aids Vessel beached in order to prevent its sinking or capsizing in the harbor.

(*b*) Communications 2006

31. By whom and to what extent assistance was rendered:

(*a*) Communications (name stations)

(*b*) U. S. Coast Guard (name vessels, stations, units, etc.) HMAS *Vigilant*—Gunboat *Gunbar*.

(*c*) Other means (vessels, etc.) 148th F.A. Regiment, U. S. Army, Had guns upon vessel's decks and fired upon Enemy.

32. Was auto-alarm signal transmitted by your vessel? 2007
Not necessary.

33. Did casualty result from the presence of explosives, inflammables, or other dangerous cargo? (For definition of above see "Explosives or Other Dangerous Articles on Board Vessels" containing the regulations prescribed by the Secretary of Commerce, April 9, 1941)—No.

34. Remarks (include names of those who lost their lives, if any): The *Portmar* was ordered to Darwin, where she loaded the 148th F. A. Regiment, U. S. Army and equipment, and proceeded toward Timor, but was ordered back by the USS. *Houston* after a bombing attack on February

2008 *United States Exhibit F.*

15, arriving back in Port Darwin, February 18. February 19 Port Darwin attacked, Ship damaged & in order to prevent capsizing ship was beached. Thomas Tyrrel, A.B., a member of the crew & several soldiers, named unknown, were killed.

(Signed) H. W. WARLEY
President

Calmar Steamship Corporation
(Title) Owners

2009

* Subscribed and sworn to before me, an officer authorized to administer oaths, this ..... day of ....., 19.....

Signed .....

Title .....

(SEAL)

* See instructions below stating when form must be sworn to. (Filing instructions omitted.)

2010

United States Exhibit F.

Mr. C. B. Yule's estimate, dated October 26, 1950, of cost of repairs of S.S. *Portmar* if made in the United States, to put the S.S. *Portmar* back in class, based on his examination of Libelant's Exhibit 47. To be separately submitted to the Court.

2011

Underwriters' Exhibit 1.

Deposition of Roy J. M. Merrett, printed at pp. 541 to 554.

Underwriters' Exhibit 2.

Testimony of English Underwriters Obtained by Commission, printed at pp. 555 to 579.

2012

Underwriters' Exhibit 3.

AMERICAN MARINE INSURANCE SYNDICATES

99 John Street, New York 7

January 12th, 1940.

Mr. DOUGLAS F. COX, Chairman
Mr. HAWLEY T. CHESTER
Mr. ROBERT R. DWELLY
Mr. ERIC E. ELLIS
Mr. SAMUEL D. MCCOMB
} Policy Form Committee.

2013

Gentlemen:

Syndicate War Risk Clauses
Free of British Capture Clause.

The Board of Managers at their meeting of December 21st last left to your Committee the matter of conferring with Mr. Englar and amending the above mentioned clause to cover while being detained for inspection by the British similarly to what has been done with the cargo clause.

2014 *Underwriters' Exhibit 3.*

Your approval is asked to the following clause which Mr. Englar has redrafted:

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the insured
2015 Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention":

which will be used in conjunction with the Syndicate War Risk Clauses where a vessel destined to the war zone is insured against war risks.

2016 Kindly indicate your approval of the clause as drawn or if it is desired to have a meeting and discuss this matter further with Mr. Englar same will be arranged.

Yours very truly,

(Signed) D. C. ANDERSON
Underwriter.

Certified Copy

S. D. LIVINGSTON,
Secretary.

Jan. 19, 1951.

Underwriters' Exhibit 4.

2017

STATE OF NEW YORK
COUNTY OF NEW YORK

S. DONALD LIVINGSTON being duly sworn deposes and says—

THAT he is now Secretary of the American Marine Hull Insurance Syndicate and that in that capacity has intimate knowledge of the records of the Hull Syndicate and its predecessor, the American Marine Insurance Syndicates.

THAT in the records of the American Marine Insurance Syndicates there is the official report of the Meeting of the Board of Managers of the Syndicates, dated January 18th, 1940, an extract of which follows: 2018

Extract from Minutes of the Meeting of the Board of Managers Held Thursday, January 18, 1940.

AMERICAN MARINE INSURANCE SYNDICATES

"Minutes of the regular monthly meeting of the Board of Managers of the American Marine Insurance Syndicates, duly called and held at 99 John Street, in the City of New York, on Thursday, January 18, 1940, at 11:20 A. M. 2019

Present:	Represented by:
Aetna Insurance Company	Mr. M. W. Morron
Atlantic Mutual Insurance Company	Mr. W. D. Winter
Boston Insurance Company	Mr. W. R. Hedge
British & Foreign Marine Insurance Co.	Mr. E. E. Ellis
Continental Insurance Company	Mr. S. D. McComb
Federal Insurance Company	Mr. Percy Chubb
Fireman's Fund Insurance Company	Mr. F. B. McBride Mr. C. R. Page
Globe & Rutgers Fire Insurance Company	Mr. J. T. Byrne

2020 *Underwriters Exhibit 4.*

Great American Insurance Company	Mr. J. W. Baker
Hartford Fire Insurance Company	Mr. J. S. Gilbertson
Insurance Company of North America	Mr. H. H. Reed Mr. R. R. Dwelly
Providence Washington Ins. Co.	Mr. J. C. Keegan
Royal Insurance Company	Mr. F. B. Zeller
St. Paul Fire & Marine Insurance Co.	Mr. H. Jackson
Westchester Fire Insurance Company	Mr. D. F. Cox

2021 There were also present: Messrs. Harwood, Anderson, McAlinden; and Mr. B. K. Ogden of the U. S. Maritime Commission.

The meeting was called to order by the Chairman, Mr. Harwood."

* * * * * * *

The Policy Committee further reported—

"Your Committee, requested to consider amendment to the Free of British Capture Clause to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being
2022 detained for inspection by the British, have considered the matter and with the advice of counsel adapted the wording of the cargo clause for use in insuring war risk on hull interests and recommend that the following clause be approved for use with the Syndicate War Risk Clauses in insuring war risk on vessels navigating in the war zone.

'Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the

insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines, or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention:' ''

Motion was made, seconded and duly carried—

To accept the report of the Policy Committee, adopting 2024
the Free of British Capture Clause (above) as an approved form for use by the War Risk Committee where, in their judgment, they find it proper to do so.

THAT the deponent states that the only pertinent parts of the Minutes of that Meeting relative to the F. C. & S. Clause is that portion which has been given above in quotation.

FURTHER the deponent saith not.

S. D. LIVINGSTON
Secretary.

New York, January 18, 1951. 2025

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss:

On this 18th day of January 1951 before me appeared S. D. Livingston, known to me be the Secretary of the American Marine Hull Insurance Syndicate who, being duly sworn, acknowledged that he executed the foregoing document, on behalf of the said Syndicate on the 18th day of January 1951.

GEORGE A. McCAULEY
Notary Public.

GEORGE A. McCAULEY
Notary Public, State of New York
No. 30-2456100
Qualified in Nassau County
Cert. filed with N. Y. Co. Clerk & Register
Term Expires March 30, 1951

(NOTARIAL SEAL)

2026

Underwriters' Exhibit 5.

AMERICAN INSTITUTE OF MARINE UNDERWRITERS
99 John Street
New York

July 18th, 1940

(Cut)

Cable Address: Amertute, New York
Telephone: COrtlandt 7-5195

To All Members:

War Risks—Free of Capture Clause
Revised Forms, Etc.

2027

The American Cargo War Risk Reinsurance Exchange has substituted for the existing F. B. O. Clause incorporated in Open Policies, Special Policies and Certificates, the following clause:—

"Notwithstanding anything to the contrary contained herein, it is understood and agreed that all shipments which are shipped to or from or transhipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free
2028 of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs; mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a Marine insurance policy

2029

warranted free of claims arising from Capture, Seizure or Detention".

Note: The word "France" omitted in new clause. New wording underlined.

In view of this amendment the Standing Committee on Forms and Clauses submits herewith for the use of members printed copies of the following revised forms which, as usual, can be purchased from Mr. Joseph Lazard of 237 Lafayette Street, New York, N. Y.:

2030

Free of Capture Clause No. 3. (87A-56)
Policy Form No. 2B. (87A-57)
Open Policy Form No. 2C, replacing Open Policy No. 2B. (87A-59)
Form 3H, replacing Form 3F. (87A-58)
Form 3I, replacing Form 3G. (87A-60)
Combination Forms of S. R. & C. C. Endorsements No. 2A and 3H. (87A-62) also of
S. R. & C. C. Endorsement No. 3A and 3H. (87A-61)

In view of the fact that the Free of Capture Clause is too long to be conveniently put on a rubber stamp, the following short clause, intended for use on certificates which contain the full war risk clauses, has been prepared by the Committee and approved by counsel.

2031

"All shipments which are shipped to or from or transhipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or by any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the con-

trol of them or any of them, in accordance with American Institute Free of Capture Clause No. 3."

The following clause may be used on certificates which either do not contain any war risk clauses or on which the war risk clauses appear in an abbreviated form:

"The property described in this policy (or certificate) is also separately insured against war risks upon the terms and conditions of American Institute 1939 form of Open Policy against War Risks Only,
2033 Form No. 2-C.

Attention is called to the fact that this war risk insurance is subject to the following restrictions and warranties:

This war risk insurance is subject to the warranty against British or Allied capture, seizure, etc., as set forth in Clause No. 9 of the said Form No. 2-C.

This war risk insurance attaches at the time of loading on board the overseas vessel and terminates as provided in the said Form No. 2-C.

This war risk insurance is warranted free from
2034 any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, as provided in Clause 2 of the said Form No. 2-C.

The terms of the War Risk Insurance as above shall not be extended or modified by any of the printed terms or conditions of this policy (or certificate) or by any clause or provision stamped or endorsed hereon unless the same refers specifically to war risk insurance."

ERNEST G. DRIVER
Secretary.

No. 1246

Underwriters' Exhibit 5. 2035

American Institute
Free of Capture Clause No. 3
(July, 1940)

87A-56

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from 2036
Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from 2037
Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

(Other enclosures in Underwriters' Exhibit 5 are to be separately submitted.)

2038

Underwriters' Exhibit 6.

American Institute of Marine Underwriters
99 John Street
New York 7, N. Y.

Cable Address: Amertute, New York
Telephone: COrtland 7-5195

Sept. 24th, 1940

To All Members:

Foreign Hulls—War Clauses

2039 The attached printed copy of war clauses is submitted to you by the Standing Committee on Forms and Clauses as recommended "American Institute War Clauses—Foreign Hulls"—(September 1940).

These revised clauses are in substitution of those issued with bulletin No. 1253 under date of July 31st, 1940, the only change being the addition of the following words:

"or held covered at an additional premium, if required."

Printed copies of these clauses (87A-68), as usual, can be obtained from Mr. Joseph Lazard, 237 Lafayette Street, New York City.

2040 Ernest G. Driver
Secretary

No. 1277

American Institute War Clauses 87A-68
Foreign Hulls
(Sept. 1940)

For Account Of

Steamer

At and From

to

and until completion of discharge, if vessel has cargo on board, but warranted that voyage shall be completed and all cargo (if any) discharged not later than
or held covered at an additional premium, if required.

Underwriters' Exhibit 6. 2041

Warranted that vessel shall sail from
not later than

It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion 2042
or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and 2043
without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel.

Warranted free of any claim for delay or demurrage and warranted not to abandon in case of capture, seizure or detention, until after condemnation of the property insured. Also warranted not to abandon in case of blockade and free from any claims for loss or expense in consequence of blockade or of any attempt to evade blockade; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by

2044 *Underwriters' Exhibit 6.*

arrests, restraints or detainments of kings, princes, or peoples.

Warranted free from any claim arising from capture, seizure, arrests, restraints, detainments, condemnation, preemption or confiscation by the Government of the United States or the Government of any State therein, or a government, de facto or otherwise, of the country whose flag the vessel flies.

The premium paid for this insurance shall not be subject to any return for layups or otherwise.

2045 The "Breach of Warranty" clause in the printed policy is deleted and the following clause substituted therefor:

> "Held covered in the event of any breach of warranty as to date of sailing or any deviation or change of voyage, provided such deviation or change of voyage is not to a port or place which is within a Combat Area as defined by the President of the United States, and provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

2046 Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

2047

Underwriters' Exhibit 7.

American Institute 87A-47
October, 1939

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the 2048
authority of the government of Great Britain, France or any of their dominions, colonies, possessions or allies; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lafard, 237 Lafayette St., N. Y. C. Printed in U. S. A. 2049

Underwriters' Exhibit 8.

87A-56

American Institute
Free of Capture Clause No. 3
(July, 1940)

Notwithstanding anything to the contrary contained in this policy (or certificate), it is understood and agreed that all shipments which are shipped to or from or transshipped at any port or place outside of the United States, its incorporated territories and its possessions in the Western

2050 *Underwriters' Exhibit 9.*

Hemisphere, are warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured property is condemned this warranty shall not exclude losses otherwise covered by this policy (or certificate) which occur while the property insured is on board the overseas vessel and which are caused
2051 by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy warranted free of claims arising from Capture, Seizure or Detention.

For sale by Joseph Lazard, 237 Lafayette St., N. Y. C. Printed in U. S. A.

Underwriters' Exhibit 9.

UNITED SALVAGE PTY. LTD. & WILLIAMS

v.

2052 THE SHIP "*Portmar*"

THE SALVAGE BOARD

v.

CALMAR STEAMSHIP CORPORATION

Judgment.

STARKE, J.:

These are salvage actions in the Admiralty jurisdiction of this Court which were by order heard together. That brought by United Salvage Pty. Ltd. & Captain Williams against the ship "*Portmar*" is an action in rem, whilst that

2053

brought by the Salvage Board against the Calmar Steamship Corporation, a company incorporated in the United States of America, is an action in personam, which is a rare form of action in salvage proceedings.

The actions relate to the salvage of the ship *"Portmar"* which had been beached near Channel Island in the Port of Darwin in the month of February 1942. There is no claim for salvage of the cargo, which consisted of field guns, army vehicles, equipment, ammunition, food and stores. The *"Portmar"* was a steel ship registered in the Port of New York, United States of America, of the burthen of 3,418 tons or thereabouts, 409 feet in length, 54 feet in beam and fitted with triple-expansion oil-burning engines of 2,580 i.h.p. She was owned at all material times by the Calmar Steamship Corporation and was under charter to the United States Maritime Commission. The salved value of the ship is admitted at the sum of £158,000.

2054

In November 1941 the ship left San Francisco bound for Manila but owing to the outbreak of war with Japan was ordered to Australia. In February 1942 the ship was at Port Darwin and left there in convoy with a regiment of United States Field Artillery, guns, equipment, ammunition, food and stores for an ordered destination. On the 16th February 1942 the convoy was attacked en route by Japanese aircraft, and, though the *"Portmar"* did not receive a direct hit, she was badly shaken by the bombs that fell around her. Ultimately the ship was ordered back to Port Darwin and proceeded there under her own power where she anchored on the 18th February. The next day Japanese aircraft attacked the ships in Darwin harbour, including the *"Portmar"*. Again she did not receive a direct hit, but the exploding bombs and gun-fire holed the hull in many places and a good deal of damage was done to compasses, boats and other parts of the ship. The ship was making water, so the anchor was weighed and the ship taken down the harbour under her own power. Troops, guns and equipment etc. were still on board. The troops

2055

2056 *Underwriters' Exhibit 9.*

were taken off the ship in a launch and small vessels that came alongside. The ship began to take a list, and she was beached as already stated off Channel Island in about 12 feet of water six or more miles from her anchorage. Attempts were made to plug the holes in the hull, but the list increased towards forty degrees; but on the high water that decreased to nine or ten degrees. The crew was allowed to go ashore, but the master and three of his men stood by the ship for some days, obtaining provisions out of the ship for the crew and doing other work about her. The ship
2057 was not "in a legal sense abandoned" (*The Glengyle*, (1898) P. 97, at p. 112), but there is no doubt that the master desired to get in touch with his owners and advise them to give notice of abandonment to the insurers because he thought the ship was a constructive total loss. The master and his men left Darwin on the 10th March 1942, but before that date he was for some few days subject to the direction of the American army authorities, and was not free to move at will in and about Port Darwin.

Williams the plaintiff is a sea captain highly experienced and skilled in stevedoring and salvage services. He was also the managing director of the plaintiff United Salvage
2058 Pty. Ltd. incorporated in the State of Victoria, for the purpose of rendering salvage services. In this company the plaintiff Williams holds about 20% of the capital. There are only six shareholders, some 3,000 shares have been issued. At the time of the raising of the "*Portmar*" the issued capital of this company was £4, of which Williams owned one share of £1 and three other persons each owned one share. It was in fact a subsidiary of United Stevedoring Pty. Ltd. and was formed apparently to take over the salvage services of that company, and Williams was paid a salary which covered his services to both companies.

Williams with other employees of the plaintiff company had arrived in Darwin on 13th February 1942 under arrangement with the Department of the Navy to raise, if possible, a submarine. And he was in Darwin on the 19th

February when the Japanese raided Darwin and damaged the *"Portmar"* and other ships. On the morning of the 22nd February 1942 Colonel Paterson of the American Army told Williams that one of their ships—the *"Portmar"*—was sunk some miles out of Darwin and asked him to see if he could get the guns and equipment out of her. Williams said he would. Accordingly he went out with Paterson to the *"Portmar"* and was joined by the master and mate of the ship. She was lying with her stem out of the water and her stern aground, some fourteen feet in the mud, and the water was rising towards her after deck at the time. She was listing about ten degrees to port. The fuel tanks were leaking, and the surface both in the ship and round about the hull was a mass of fuel oil. A considerable number of holes were visible along her port side from the engine room to the after hatch, and some of the derricks were down and the port wing of the bridge was smashed. Williams examined the cargo to some extent and told Paterson that he thought he would be able to recover the guns. Paterson said to get on with the job as soon as possible. Williams also had some conversation with the master concerning the ship. He asked about the condition of the ship, and I have no doubt that the master said that he intended to go ashore and report to his owners that the ship was a constructive total loss. And I feel satisfied that Williams said he did not think she was and that he thought he could raise her. But the master persisted that his ship was finished and that Williams could not raise her. Williams returned to Darwin and saw Captain Thomas, the Naval Officer Commanding at the port, who promised him every assistance. On the following day Williams returned to the ship with Captain Low, who was in the employ of the plaintiff company, and also some naval ratings provided by Captain Thomas. Soundings were taken right along the ship to ascertain how she was lying, and it was noticed that the ship listed much more at low water than at high water. The most urgent matter was to get the guns and army

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vehicles from the "*Portmar*" for the use of the American Army and the defence of Darwin, but I have no doubt that Williams had also resolved to raise the ship. The problem presented no technical difficulties to so skilled a salvor as Williams, but there were some local conditions that created some practical difficulties.

(1) The tide in Darwin runs at about five knots and rises and falls about twenty-five feet. There was a danger that the tide might force the ship over. There was also a danger that storms, which come on very suddenly around
2063 Darwin, might force the ship across the bed she had made for herself and result in the breaking of her back.

(2) There was a grave risk of further aircraft attacks by the Japanese, and indeed the naval and military authorities feared that invasion was imminent. Consequently it was prudent and necessary that Williams' operations should be done at night time so that the Japanese might not see them.

(3) The fuel tanks were leaking: the ship was covered with fuel oil, every rope was slimy and round about the hull was a mass of fuel oil.

2064 (4) The ship had listed some nine or ten degrees. The most urgent problem according to Williams was to take out the cargo "forrard", for that would ease the ship.

So in the last week of February 1942 gear was rigged; some of it belonged to the company, of a value of about £600, and some was ship's gear. The American authorities provided Williams with some soldiers and the Naval authorities provided him with some naval officers and ratings. The Naval authorities also provided him with a naval vessel, the "*Gunbar*", which supplied power and also the use of her winch. A lighter also was supplied for landing the guns. The soldiers and naval ratings were not experienced stevedores, and Williams and Low, who were experienced in stevedoring, worked with and directed them.

By this means a number of army vehicles were recovered. Steps were also taken to plug the holes in the ship, and hooked plates were made for that purpose by arrangement with the naval authorities. A stern mooring was put down to hold the stern of the ship off a nearby reef. 2065

Soundings were taken and markings put down ashore. Early in March arrangements were made with the naval authorities to bring a steam tug called the *"Wato"* alongside with a 10 inch salvage pump to lower the water in the ship. She was made fast on the starboard quarter and started to lower the water, but the tide was falling rapidly and the pipe line had to be broken because the flexible portion of the pump was not long enough. There was no other pump in Darwin, so on 8th March 1942 Williams proceeded to Melbourne by air to obtain a suitable pump, which he succeeded in doing, and he also engaged a diver. He arrived back in Darwin on the 20th March and went straightway to the *"Portmar"*. The diver made a thorough under-water examination of the steel plating. 2066

All the heavy cargo was taken out. A platform was erected for the pump. On the 4th April the pump was started, the *"Gunbar"* being on the port quarter and the *"Wato"* on the starboard. The ship just lifted as the tide was almost at the top of the flood, so the *"Wato"* pushed her stern around onto a spit that was found when sounding and the ship was settled on the spit on an even keel. More patches were put on the hull. On the 5th April pumping was again started about two hours before low water. The ship floated, and she was hauled out by a ship provided by the naval authorities into the place marked off for her. The diver examined the ship's bottom, her engines were examined and also her plates. The salvage service claimed in these actions ended at this point, and the ship was handed over to the shipping control at Darwin, from whence she was towed to Brisbane and after some further repairs left for Sydney, and presumably came ultimately under the control again of the United States Maritime Commission. 2067

2068 *Underwriters' Exhibit 9.*

"A salvage service . . . may be described . . . as a service which saves or helps to save maritime—property—a vessel . . . when in danger; either at sea or on the shore of the sea, or in tidal waters, or on the shore of tidal waters, if and so far as the—rendering of such service is voluntary and attributable neither to legal obligation, nor to the interest of—self-preservation, nor to the stress of official duty" (Kennedy, The Law of Civil Salvage, 3rd. ed., p. 2). The services rendered to the *"Portmar"* were of this nature.

2069 It was argued for the owners of the ship that no salvage services were rendered to the ship because they were directed solely to the recovery of the guns etc. for the American Army and that the raising of the ship was incidental to that operation. Reference was made to the fact that a claim has been made against the American Army authorities for £2,500 for services rendered in salvaging United States Army property comprising guns, vehicles, petrol and equipment which includes several of the items of claim alleged to have been expended in the salvage services rendered in respect of the ship—*"Portmar"*. But the contention cannot be sustained so soon as the master of the ship stated that he proposed to advise his owners to abandon her as a constructive total loss I have no doubt

2070 that Williams resolved to—raise her. He did raise her without any legal obligation to do so. It was a skilful and very valuable service to a ship that, in my opinion, would otherwise have become a wreck and gone to pieces owing to the action of the rising and falling tide at Darwin and the sudden storms that arise in that neighbourhood. Apart from the naval authorities, who had much else to do, there was no one competent or available in Darwin to raise the ship, for all the inhabitants, including men brought by Williams from the south for raising a submarine, fled after the Japanese attack. It was a fortunate accident that so experienced, energetic and skilful a salvor as Williams was present in Darwin when the *"Portmar"* was beached.

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Next it was suggested that the services rendered by Williams were rendered in the performance of his public duties as the Chief Salvage Officer of the Salvage Board. It is enough at this point to say that Williams personally worked and laboured in and about the raising of the "*Portmar*" beyond the scope of the duties of that office or appointment. But I shall have to return to the work he actually performed and in what capacity that work was performed in connection with other aspects of this case, and say no more about it at present.

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It was also contended that the United Salvage Pty. Ltd. and the Salvage Board were incapable of claiming salvage awards because awards of this character were only decreed in favour of "those personally engaged in the service" (*The Charlotte*, 3 W. Rob. 68, at p. 72). But in these days it is recognised, if it were ever doubted, that salvage services may be rendered by corporations formed for that purpose (*The Glengyle*, (1898) P. 97; (1898) A. C. 519). And perhaps I had better here also mention "*The Chieftain*", 4 Notes of Cases 459.

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It is settled that in all salvage cases, whether the action be in rem or in personam, there must be some res saved (*The Cargo Ex Port Victor*), (1901) P. 243, at p. 255). In *The Chieftain*, (supra), which were proceedings in personam a monition (by which proceedings in personam were then commenced) was moved for against the owners of the salved ship calling upon them to show cause why an agreed salvage award should not be paid and the facts were that at some time after the salvage services had been rendered the ship was lost. Dr. Lushington said:—"There seems to me the greatest possible difficulty in acceding to this motion as the property is actually lost and gone and a monition to show cause is decreed only in cases where the property had been allowed to go into the hands of the owners instead of the parties attaching the property itself. . . . It would be to convert the jurisdiction of the Court from a proceeding in rem to a proceeding in personam which can only be

2074 *Underwriters' Exhibit 9.*

where the property is in possession of the proprietors themselves". This reason seems inconsistent with the reasoning in *"The Port Victor"* (supra). But even if the *"Portmar"* were lost by enemy action as was stated at the Bar, subsequently to her being raised at Darwin, still I should think, consistently with Dr. Lushington's observations that she had got into the owners' or charterers' hands after she was raised at Darwin and was lost whilst in their hands.

Another question arises between United Salvage Pty.
2075 Ltd. and the Salvage Board in respect of the services rendered by Williams. The United Salvage Pty. Ltd. claims that Williams in raising the *"Portmar"* was acting within the scope of his duties as its managing director and as its officer, whilst the Salvage Board claims that from the 20th March 1942 he was acting within the scope of his duties as its Chief Salvage Officer. National Security (Salvage Board) Regulations made on 4th March 1942 and notified in the Gazette on the 14th March 1942 provided that there should be a Board to be called the Salvage Board which should be a body corporate with perpetual succession and a common seal. The Board, it was also provided, should
2076 consist of three members, namely:—

(a) The Chairman of the Shipping Control Board (See National Security (Shipping Control) Regulations) who should be chairman and who was in fact, until the end of May 1942, Sir Owen Dixon, a Justice of this Court.

(b) The Chief Salvage Officer.

(c) A person appointed by the Minister on the recommendation of the Naval Board.

The Minister was also authorised to appoint a Chief Salvage Officer of the Board for the purposes of the regulations with such remuneration and on such terms and conditions as the Minister thought fit. The Chairman and one

other member formed a quorum. The Board might authorise the Chief Salvage Officer to direct, control, supervise or carry out all or any salvage operations. 2077

On the 27th March 1942 the Minister approved of a proposal of the Secretary of the Department of Commerce that he should ascertain what remuneration Williams obtained from certain commercial organizations of which the United Stevedoring Company was the principal and that Williams should be taken over by the Salvage Board as Chief Salvage Officer and paid a salary at least equal to that which he then received on the understanding that whilst employed on Salvage Board work he would not draw his fees or salary as managing director of the companies. 2078
On the 13th April 1942 the secretary suggested to the Minister that Williams should be paid a salary as Chief Salvage Officer and member of the Salvage Board £2,080 per annum and that he paid his own insurance premium. And the secretary on the same date also advised that the Minister for the Navy had nominated Lt. Commander Geoffrey Fleming Dixon R.N. as representative of the Navy on the Salvage Board and recommended to the Minister of Commerce that he appoint him accordingly. On the 14th April 1942 the Minister approved of the foregoing suggestion and recommendation. 2079

The first formal meeting of the Salvage Board was on 18th April 1942. Sir Owen Dixon severed his connection with the Board about 26th May to take up another public appointment as Minister Plenipotentiary at Washington. And on 4th June 1942 the Minister announced for general information that the following persons had been appointed to be members of the Salvage Board constituted under the National Security (Salvage Board) Regulations:

Chairman of Shipping Control Board, His Honour Judge Thomas Stuart Clyne.

Chief Salvage Officer, John Protheroe Williams.

Nominee of Naval Board, Lt. Commander Geoffrey Fleming Dixon R. N.

2080 *Underwriters' Exhibit 9.*

The Salvage Board has not, I think, established that Williams in raising the *"Portmar"* was acting as its Chief Salvage Officer or that he was acting within the scope of his duties as such officer. Williams and Lt. Commander Dixon were not appointed as members of the Salvage Board before 14th April 1942 or perhaps before 18 April when the Board held its first formal meeting. The salvage services in respect of the ship *"Portmar"* were completed, it should be remembered, on the 5th April 1942 or at latest on the 6th April when Williams left for Melbourne, where he arrived
2081 by air on the 9th April 1942. And it is to be noticed that on the 30th March when it was feared that the pumps which Williams had procured in Melbourne had not arrived in Darwin, it was to his Company, the United Stevedoring Company, that - - - Williams notified the fact and stated they were urgently required. And it is also to be noticed that it was not until the 11th May 1942 that the United Salvage Pty. Ltd. granted Williams leave of absence from his employment in that company whilst engaged on duties with the Salvage Board. All the negotiations initiated by Sir Owen Dixon for Williams' services were tentative and in anticipation of the Minister appointing Williams and Lt. Commander Dixon to the Salvage Board. But the Salvage
2082 Board incurred no legal responsibility until Williams and Lt. Commander Dixon were formally appointed. And I think the Chairman was careful to avoid any such responsibility for the Board until it was fully constituted. Thus there is a minute of what is called a preliminary meeting of the Salvage Board which sets forth that Sir Owen Dixon advised that until the members of the Board had been gazetted it was not possible to set up the organization of the Salvage Board but that meanwhile many matters dealing with the physical requirements of the Salvage Board could be put in hand. And indeed Sir Owen did not think the Salvage Board was in a position to give Williams a letter as from the Salvage Board when he returned to Darwin to raise the *"Portmar"* requesting that all assistance be given to him.

But it was said for the Salvage Board that it was in existence from the 14th March 1942 (Acts Interpretation Act 1901-1937, S. 48) although unable to function as a corporate body until its Chief Salvage Officer and Naval representative were appointed about the 14th April 1942. And further that on their appointment the acts and doings of Williams in connection with the raising of the *"Portmar"* from the 20th March 1942 when he first met Sir Owen Dixon were approved and ratified as acts and doings of the Board or as done on its behalf. It is true that Williams, after he was appointed, was paid salary as from the 27th March 2084
1942 but there are liabilities amounting to about £1,000 connected with the raising of the *"Portmar"* that the United Salvage Pty. Ltd. paid, for instance, hire of pumps to 6th April £281—the day after the *"Portmar"* was raised—rail and air fares and insurance for Williams and others in connection with the visit to Melbourne to procure pumps and return to Darwin, and wages. I have not overlooked the fact that United Salvage Pty. Ltd. has charged some, if not all, of these items against American Army authorities. But the point is that the Salvage Board never concerned itself with these obligations even though a proportion of the sum might properly be chargeable to the raising of the *"Portmar"*. 2085
And there are various records relied upon by the Salvage Board the purport of which is that the Board and Williams recognized that he was the Board's officer from about the 20th March 1942 when he first met Sir Owen Dixon, as already mentioned. According to *Kelner* v. *Baxter*, L. R. 2 C. P. 174, ratification can only be by a person or a body ascertained at the time the act was done—by a person or body in existence either actually or in contemplation of law. The case of *Sutton's Hospital*, 10 Coke Rep. 1(a), 23(a); 77 E. R. 937, 960, it is said, suggests that the Salvage Board was a corporation in abstracto if not in concreto from the 14th March 1942 when the Salvage Board Regulations were gazetted. The fact in that case, however, was that named persons and their successors were incor-

porated (*Sutton's Hospital, (supra)* at pp. 9, 10(a), 26(a)). But apart from this technical answer to the contention of the Salvage Board, Williams, it appears to me, was more concerned with raising the "*Portmar*" than with the body for whom he was conducting the operations or acting or purporting to act. Thus in April 1942 he was discussing with Lt. Commander Dixon and the secretary of United Salvage Pty. Ltd. the financial aspects of the salvage operations at Darwin and how to divide and treat financially those operations, and in June 1942 he was engaged in much
2087 the same sort of discussions with various interested parties. And Williams, I think, always had in mind that "it was permissible for the person who actually performed the work" to claim salvage reward (See Salvage Board's Minute, 10th August 1942). Further, Williams did not, I feel sure, intend to oust the claims of United Salvage Pty. Ltd. as salvors of the "*Portmar*". And I am not prepared to find that Williams by his actions dispossessed or intended to dispossess or could dispossess the United Salvage Pty. Ltd. without its knowledge and assent from whatever right it had as salvors in possession of the "*Portmar*" by reason of the operations of its managing director and officer (See Kennedy, Law of Civil Salvage, 3rd ed., p. 213). I would
2088 add that even if the operations of Williams on the "*Portmar*" from 14th March 1942 onward were to be regarded as operations conducted on behalf of the Board, I should not be prepared to make any salvage award in favour of the Board. Williams was appointed by the Minister as Chief Salvage Officer but the Board did nothing and risked nothing in the raising of the "*Portmar*", apart from the salary the Board paid to Williams from the 27th March 1942 and the obligations it incurred under an agreement made with the Marine Underwriters & Salvage Association of Victoria Ltd. dated 17th March 1942, but signed, I think, about 15th May 1942. And it is to be noticed that the United Salvage Pty. Ltd. paid for the hire of the pumps £281.17.2 until 6th April 1942 and that the pumps were used and

ultimately acquired by the Salvage Board after that date in connection with the "*Portmar*" and her towage to Brisbane and other purposes. Williams, I must add, even if he were the Chief Executive Officer of the Board at any relevant time, nevertheless, worked and laboured far beyond the scope of any duty as Chief Salvage Officer: he worked in danger of bombing and invasion: he helped to rig and work gear: he worked amidst the fuel oil and directed and helped the workmen in repairing the ship: he made soundings and laid down markings and slept anywhere he could. The operations were peculiarly a personal 2090
effort on the part of Williams.

The claim of United Salvage Pty. Ltd. and Williams for a salvage reward remains for consideration. The services rendered were, and I have said, salvage services. The United Salvage Pty. Ltd. and Williams do not seek for the distribution of the salvage award between them but desire that their claim shall be dealt with without any separation of interests. There is no absolute rule or fixed scale of remuneration. "It is not a mere question of work and labour, not a mere calculation of hours, though time is undoubtedly an ingredient; but there are various facts for consideration—the state of the weather, the degree of 2091
damage and danger as to ship and cargo, the risk and peril of the salvers, the time employed, the value of the property, and when all these are considered, there is still another principle—to encourage enterprise, reward exertion, and to be liberal in all that is due to the general interests of commerce, and the general benefit of owners and underwriters, even though the reward may fall upon an individual owner with some severity" (The Industry, 3 Hagg. 203, at p. 204). The nature of the service has already been described, and the value of the ship, and the danger to which it was exposed, and the time employed have been stated. The value of the property risked by the salvors in the service was not large, gear worth £600 or so and pumps hired from the Underwriters Association valued at about £1,700

2092 *Underwriters' Exhibit 9.*

which were taken over ultimately by the Salvage Board. The Naval authorities, it will be remembered, gave great assistance and provided plant and material and ratings in order to effect the salvage services. But I have been informed that the Naval authorities make no claim, and that the officers and ratings who rendered personal services in connection with the raising of the "*Portmar*" have dispersed, and records of their services are not available. The expenses incurred in the performance of the salvage services (which are also a matter to be considered) are set
2093 forth in the particulars under paragraph 11 of the statement of claim at £1,045 but some of these items have also been claimed against the American Army authorities and will probably be paid by them. But I have not overlooked the possibility of non-payment nor the expenses that have not been claimed against the Army. And I think I may legitimately refer to the fact that a claim for £2,500 is made against the American Army authorities for recovery of the guns etc. estimated to be of a value of not less than £100,000 in Australian currency (See Exhibit 4). The recovery of the guns etc. was not, it must be observed, a salvage service but services rendered upon request for
2094 which I should think reasonable remuneration would be payable in any event. The services rendered to the ship were true salvage services, independent of contract and dependent in respect of remuneration upon their success. They were skilful and energetic, rendered in somewhat difficult and uncomfortable conditions and in circumstances of considerable danger.

I have looked at the amounts of awards made in many cases in England, but, as might have been expected, they range from many thousands to a few hundreds of pounds according to the circumstances of each particular case. And in this case, having regard to all its circumstances, I award the sum of £5,000 to the plaintiffs, the United Salvage Pty. Ltd. and Captain Williams, in respect of the services rendered by them in the salvage of the ship

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"Portmar". And these plaintiffs must also have their costs of action including the costs of the shorthand notes. The claim of the Salvage Board is dismissed and the Board must pay the costs of its action against Calmar Steamship Corporation which are exclusively attributable to that action.

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2098 **Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
2099 UNITED STATES OF AMERICA,
Respondent. Ad. 129-295

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents. Ad. 133-332
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Appearances:

KIRLIN, CAMPBELL & KEATING, Esqs., Proctors for libelant; EDWIN S. MURPHY, IRA A. CAMPBELL and HELEN C. CUNNINGHAM, Esqs., of Counsel.

IRVING H. SAYPOL, Esq., U. S. Attorney, Proctor for respondent—United States; EDWARD L. SMITH and JOHN A. MONTGOMERY, JR., Esqs., of Counsel.

MENDES & MOUNT, Esqs., Proctors for respondents Scott, etc.; RUSSELL T. MOUNT and WALTER B. HALL, Esqs., of Counsel.

—all of New York City.

RYAN, J.

These two suits brought in the admiralty by Calmar Steamship Corporation, as owner of the SS. *Portmar*,

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arise out of the voyage of that vessel from San Francisco which began on November 28, 1941. On that voyage she was damaged by Japanese air attacks while in the Timor Sea on February 15 and 16, 1942, and in the harbor of Port Darwin, Australia, on February 19, 1942, she was subsequently beached after these attacks near Darwin.

The suits were tried together and the findings of fact hereinafter made and the conclusions of law reached are to be applied to both suits.

The first libel (Ad. 129-295) was filed on February 11, 1944 by "Calmar" against The United States of America. The libel as filed named a number of individual respondents; as to them it has been discontinued and now proceeds only against the United States. The suit asserts claims upon a time charter party for damage to the *Portmar* from Japanese bombing and strafing on February 15, 16 and 19, 1942 and charter hire from March 1, 1942 (later amended to February 19) to November 17, 1942.

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The United States asserts, by answer, that this court has no jurisdiction over the suit against it and, in addition, denies any liability on its part. It pleads in support of the objection to jurisdiction that the suit is not within the permission to sue contained in the Suits in Admiralty Act (Secs. 1 and 2, 46 U. S. C. A. 742), due to the fact that the *Portmar* was not a merchant vessel operated by or for the United States and because the claims asserted are not cognizable under the Public Vessels Act (Sec. 1, 46 U. S. C. A. 781), or other governmental consent to be sued in the district court. Liability is disclaimed for the damages sustained by the *Portmar* as a result of enemy action because such losses are either within the coverage of the war risk insurance taken out pursuant to the provisions of the charter, or are excluded from coverage by reason of risks assumed by the owner or its failure to take out adequate insurance. Liability is denied for charter hire in addition to that paid because the obligation to pay hire terminated

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2104 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

by express provision of the charter by reason of the *Portmar's* becoming a constructive total loss on that date, or in the alternative because the owner's election to treat her as such terminated the obligation to pay hire.

"Calmar" filed the second libel (Ad. 133-332) on November 15, 1944 against the war risk underwriters of the *Portmar*, who have rejected liability for the losses sustained on this eventful part of the voyage of the *Portmar*. The suit is based on three policies of war risk insurance (all to the
2105 same effect and of the same tenor, except as to amount), totalling $860,000. The libel pleads claims totalling $902,761.12 with interest, of which $860,000 is sought to be recovered for a constructive total loss of the vessel, and $42,761.12 with interest for certain "sue and labor" expenses. The libel asks that if it be held that the damage did not amount to a constructive total loss under the policies in suit, then that for a partial loss there be awarded the sum of $250,000 with interest.

The underwriters deny liability upon the ground that the vessel was not covered by the war risk insurance policies issued by them at the time the *Portmar* sustained the dam-
2106 age, because (a) she had been insured as a commercial and cargo vessel for trading and when damaged she was a ship of war and part of an invasion expedition, (b) that the voyage covered had terminated prior to the bombing, straf-ing and beaching of the vessel, (c) that she had been intentionally exposed as a warship to enemy attack, (d) that the "capture, seizure, arrest, restraint, detainment, etc." rider of the policies did not cover the damage sustained, (e) that if it be determined that the insurance had not terminated at the time of the damage, the "held-covered" clause of the policies applied and the additional premiums thus due amount to not less than 75% of the insured value of the vessel, which should be set off against any recovery allowed, (f) that there was not a constructive total loss and that the tender of abandonment to the underwriters was

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ineffectual, and finally (g) that in view of the provisions of the charter party, there was at no time any capture, seizure, arrest, restraint or detainment of the *Portmar*.

The libel against the United States is largely alternative to the result of the suit against the underwriters. In January, 1948, "Calmar" also filed suit against the United States in the Court of Claims (No. 48509), seeking to recover for substantially the same claims as those pleaded in the first libel herein. This suit is pending and undetermined.

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With the issues thus framed, the suits herein proceeded to trial. After consideration of the testimony and exhibits, I make the following:

Findings of Fact.

(1) Calmar Steamship Corporation is a corporation duly organized and existing under the laws of the State of Delaware, with its principal place of business at 25 Broadway, County, City and State of New York.

(2) Calmar Steamship Corporation was the owner of the SS. *Portmar* during the period beginning November 21, 1941 and ending at noon, Eastern Australian Time, November 17, 1942.

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(3) The SS. *Portmar* was a single screw ocean cargo steamship registered under the laws of the United States, built in 1919, classified and maintained in Class A-1, Lloyd's Register of Shipping. Her tonnage was gross 5,500, net 3,418, deadweight capacity 8,600 tons. Her dimensions were length 409.8′; beam 54.2′; depth 27.7′. Her speed on a consumption of 164 barrels of fuel oil per day was in excess of 9½ knots.

(4) As of November 21, 1941 Calmar Steamship Corporation chartered the SS. *Portmar* to the United States acting, pursuant to statutory authorities, by and through

2110 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

the United States Maritime Commission by a voyage charter on a time basis, which contained among others, the following provisions:

"PART I.

"ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the
2111 Philippine Islands, returning to U. S. North Atlantic port or ports."

"ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, * * *"

2112 "ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000."

"ARTICLE 1.04. The Vessel shall be delivered at the port of Portland, Oregon on or about November 21, 1941, and redelivered (unless lost) at a U. S. North Atlantic port, north of Cape Hatteras. * * *"

PART II.

"ARTICLE 2.01. * * * The Vessel on her delivery shall be ready to receive cargo with clean-swept holds and, as far as due diligence can make it so, tight, staunch, strong and in every way fitted for service, hav-

ing water ballast, winches and power sufficient to run all the winches at one and the same time and a Master and a full complement of officers and a crew for a vessel of her tonnage, and due diligence shall be exercised by the Owner to maintain her in such state during the currency of this Charter. * * *"

"ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, except that where two or more successive casualties contribute to such loss, the time of the casualty last occurring shall be the time when hire ceases. Redelivery shall not be made until completion of repairs of any damage arising from causes specified in ARTICLE 2.04 (ii), and hire shall continue until completion of such repairs, except to the extent that loss of time is caused by failure of the Owner to exercise due diligence to have such repairs effected promptly and to prevent loss of time. The hire provided for in this Charter shall be due and payable on the first day of each calendar month for the preceding month or portion thereof. * * *"

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"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown

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of machinery, collision, stranding, or fire or other accident or damage to the Vessel; * * *"

* * * * * *

"*Provided*, however That, except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

* * * * * *

2117 "(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; * * *"

2118 "Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for."

* * * * * *

"ARTICLE 2.05. The Owner shall provide and pay for: all provisions; all galley, cabin, deck and engine room stores; fuel for cooking; wages of, and consular, shipping and discharging fees and other expenses pertaining to, the Master, Officers and Crew (xcept as herein otherwise provided); 25% of all fresh water used by the Vessel if a steamer, or 75% if a motorship, all water ballast; and insurance (except as herein otherwise provided) on the Vessel."

"ARTICLE 2.11. * * * The Master (although appointed by the Owner) shall be under the orders and directions of the Charterer as regards employment, agency, and prosecution of the voyages; * * *"

"The charterer shall indemnify and hold harmless the Owner, the Master and the Vessel from all consequences and liabilities whatsoever arising from compliance with any orders or directions of the Charterer or its agents, given pursuant to this Article or any other Article of this Charter."

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"ARTICLE 2.16. * * * And neither the Vessel, her Master or Owner, nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, pirates, or assailing thieves; arrest or restraint of princes, * * *. No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

"ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so 2121 elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots, and civil commotion valued at the amount insured: (ii) all war risk insurance, as required, on the lives of or for injuries to officers and crew and loss of or damage to

2122 their personal effects, including sextants of deck officers, or leased equipment aboard for which the Owner is responsible, and on slop chests; and (iii) war risk protection and indemnity insurance, for the benefit of the Owner and the Charterer as their interests may appear, including Owner's liabilities to officers and crew until repatriated."

"The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article 2123 has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient."

* * * * * * *

"ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer."

* * * * * * *

"ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, 2124 stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; *provided, however*, that whenever any such orders or directions given otherwise than by the Government of the United States or its representative are contrary to sailing directions or other orders of the Charterer as to the employment of the Vessel hereunder, the Master shall, if practicable,

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apply to the Charterer or its agents or to a representative of the Government of the United States for consent or advice and shall not comply with such orders or directions unless such consent or advice to comply is first obtained; provided further, however, that if it is impracticable in any case to act in accordance with the foregoing proviso, the Master's decision as to compliance with any such orders or directions shall be made with due regard to the interests of all concerned, including the Charterer, the Owner, the Vessel, her crew and cargo."

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(5) Pursuant to the provisions of Article 2.17 of said Charter, Calmar Steamship Corporation took out war risk insurance under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, on the hull and machinery of SS. *Portmar* valued at $860,000. Said insurance was arranged through its brokers, Mather and Company, Philadelphia, and their London correspondent, Thomas Stephens & Sons, Ltd.

(6) Slips binding said war risk insurance were submitted to the various underwriters representing members of syndicates of Lloyds, London, and to members of the Institute of London Underwriters, and to the Excess Insurance Company, Ltd., all of whom initialed the slips with notation as to amounts of portions of the risk subscribed.

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(7) Said slips contained among others the following provisions:

"U. S. Dollar A/C
"Portmar" /S/

U. S. Pacific to at and from Philippines and return to U. S. Pacific &/or Atlantic port or ports and 15 days
via port or ports in any order
HULL & MACHINERY valued $860,000.

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"Against war, s.r. & c.c. and m.d. American Clauses N. Y. S. Cl. Undrs. pay tax."

Said slips were initialed by said underwriters on November 26 and 27, 1941.

(8) Prior to November 26, 1941, negotiations between the Secretary of State, Hon. Cordell Hull, and Japanese envoys, Admiral Kichisaburo Nomura, and Mr. Saburo Kurusu, approached a critical stage. The daily press car-
2129 ried news items of increasing tension in the Pacific situation. The possibility of war with Japan was openly recognized and provoked much discussion in American and British official circles. The British Prime Minister had discussed the extent of British naval participation in the Pacific in the event of war with Japan. It was generally expected that danger might develop at any moment in the Far East.

(9) Mather & Company sent to Thomas Stephens & Sons, Ltd. printed forms of marine hull insurance in the form "American Institute Time (Hulls) (July 1, 1941)" and War Risk Clauses and riders to be attached thereto
2130 in the form published by the American Institute of Marine Underwriters, after adoption and promulgation by the American Marine Insurance Syndicate.

(10) On January 19, 1942, Sydney Keith Scott and other underwriting members of Lloyds, London, respondents herein, issued a policy of war risk insurance on said forms, insuring Calmar Steamship Corporation in the total sum of $714,000 on the hull and machinery of SS. *Portmar* valued at $860,000, at and from a United States Pacific port to port or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports any order and for twenty-four hours after arrival.

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(11) On January 19, 1942 Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., British Law Insurance Co., Ltd., Planet Insurance Co., Ltd., Elders Insurance Co., Ltd., and National Provincial Insurance Co., Ltd., as members of the Institute of London Underwriters issued a policy of war risk insurance on said forms, insuring Calmar Steamship Corporation in the total sum of $116,000 on war risk insurance on the hull and machinery of SS. *Portmar* valued at $860,000 at and from a United States Pacific port to port 2132
or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports any order and for twenty-four hours after arrival.

(12) On January 19, 1942, Excess Insurance Company, Ltd., issued a policy of war risk insurance on said forms insuring Calmar Steamship Corporation in the sum of $30,000 on the hull and machinery of SS. *Portmar* valued at $860,000, at and from a United States Pacific port to port or ports in the Philippine Islands whilst there and return to United States Pacific port or United States Atlantic port (via Panama Canal) via port or ports in any 2133
order and for twenty-four hours after arrival.

(13) Libelant duly paid to respondents the issuing premiums required by said policies.

(14) The said policies contained among others the following provisions:

> "Only against the risks of war, strikes, riots and civil commotions as per American form attached."
>
> "Touching the Adventures and Perils which we, the said Underwriters, are contented to bear and take upon us, they are of the Seas, Men-of-War, Fire, Enemies, . . . and of all other like Perils, Losses and Misfortunes that have or shall come to the

Hurt, Detriment or Damage of the said Vessel, &c., or any part thereof; excepting, however, such of the foregoing Perils as may be excluded by provisions elsewhere in the Policy or by endorsement. And in case of any loss or Misfortune it shall be lawful for the Assured, their Factors, Servants and Assigns to sue, labor and travel for, in, and about the Defense, Safeguard and Recovery of said Vessel, &c., or any part thereof, without prejudice to this Insurance, to the Charges, whereof the Underwriters will contribute their proportion as provided below. And it is expressly declared and agreed that no acts of the Underwriters or Assureds, in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

. . . . . .

"Notwithstanding anything herein contained to the contrary, this Policy is warranted free from Particular Average under 3 percent., or unless amounting to $4,850, but nevertheless when the Vessel shall have been stranded, sunk, on fire, or in collision with any other ship or Vessel, Underwriters shall pay the damage occasioned thereby, and the expense of sighting the bottom after stranding shall be paid, if reasonably incurred, even if no damage be found."

. . . . . .

"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

"In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the

damaged break-up value of the Vessel or wreck shall be taken into account."

* * * * * * *

"F. C. & S. Clause.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or 2138
of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or war-like operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

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* * * * * * *

War Risk Clauses.

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty.

"This insurance is also subject, however, to the following warranties and additional clauses:

The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrections or civil strife

2140 arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments 2141 not arising from actual or impending hostilities or sanctions.

The Franchise warranty in the attached policy is waived and average shall be payable irrespective of percentage and without deduction of new for old. The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

* * * * * * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change 2142 of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." F-300

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise

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covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

(15) Calmar Steamship Corporation by letter of November 26, 1941, informed the United States Maritime Commission of the kind and amount of insurance that it had taken out for this voyage. 2144

(16) The said policies of insurance were approved by the United States Maritime Commission, and were in accordance with Article 2.17 of said charter.

(17) During the period beginning November 21, 1941 and ending November 17, 1942, the Master of the *Portmar* was Axel Michelson, a duly licensed and competent master mariner, employed by Calmar Steamship Corporation, and who had been in the employ of Calmar since 1927.

(18) Pursuant to said charter, on November 23, 1941, high octane gasoline in drums was loaded on the *Portmar* at Oakland, California, and military equipment, supplies and ammunition were subsequently loaded at San Francisco, California. 2145

(19) Prior to sailing on the voyage the Master received secret written and oral orders from the U. S. Naval Control officer in San Francisco, 12th Naval District, imposing radio silence shortly after leaving San Francisco, and stating the following successive positions to be passed through by the *Portmar* on the outward voyage from San Francisco to Manila, Philippine Islands: (1) Lat. 37° 45′ N; Long. 122° 41′ W; (2) Lat. 32° 30′ N; Long. 129° 30′ W; (3) Lat. 22° 50′ N; Long. 140° 00′ W; (4) Lat. 13° 50′ N; Long. 149° 40′

W.; (5) Lat. 3° 45′ N; Long. 160° 00′ W; (6) Lat. 6° 00′ S; Long. 170° 45′ W; (7) Lat. 11° 50′ S; Long. 180° 00′; (8) Lat. 12° 50′ S; Long. 166° 30′ E; (9) Lat. 15° 25′ S; Long. 157° 30′ E; (10) Lat. 12° 10′ S; Long. 148° 10′ E; (11) Lat. 5° 35′ S; Long. 130° 00′ E; (12) Lat. 6° 00′ N; Long. 123° 05′ E, to destination.

(20) The routing orders thus given the *Portmar* were given by the United States as sovereign and not as charterer, and were such as were customarily issued during this
2147 period to those in charge of American flag, cargo vessels regardless of ownership or charter arrangements. The prescribed course did not follow the usual and customary commercial lanes travelled in normal times between San Francisco and the Philippines.

(21) The Master did not inform Calmar Steamship Corporation of the points stated in the said Naval Orders, and Calmar did not know the route thus prescribed.

(22) On November 28, 1941, the *Portmar*, fully manned, equipped, supplied and seaworthy in all respects, sailed from San Francisco pursuant to said charter and followed
2148 the course prescribed in the Naval Orders.

(23) At the time the *Portmar* sailed there were three U. S. Army Sergeants on board as supercargoes, one of whom had a complete manifest of all cargo on board.

(24) On December 7, 1941, the Japanese attacked Pearl Harbor.

(25) On December 7, 1941, at about 8 a. m. the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. The *Portmar* was then at about Lat. 15° 0′ N; Long. 149° 0′ W, about 600 miles south east of the Hawaiian Islands.

(26) The U. S. Naval routing orders required the *Portmar* to pass between or near Fanning and Christmas

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Islands. The Master knew of cable landings on those islands, and feared that he could not pass said islands by night or day without being observed, attacked and possibly captured by the Japanese. Properly, for the safety of his vessel, he put the *Portmar* on a southerly course to avoid all the islands until further naval orders were received.

(27) On December 8, 1941, the United States and Great Britain declared war against the Japanese Empire.

(28) On December 9, 1941 HMS *Prince of Wales* and HMS *Repulse* were destroyed by Japanese aircraft off the east coast of the Malay Peninsula. The loss of these two ships together with United States losses at Pearl Harbor gave the Japanese full battle fleet command of the Pacific. The Japanese then had naval superiority which enabled them to transport troops to almost any desired point, possess themselves of it, and establish it for an air-naval fueling base.

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(29) On December 11, 1941, when the *Portmar* was at about Lat. 2° 0′ S, Long. 148° 0′ W, the Master received an order by radio from the Commandant of the 12th U. S. Naval District, San Francisco, ordering the *Portmar* and three other vessels to proceed to Suva, Fiji Islands, and there receive further instructions from the British Naval Authorities. The *Portmar* in compliance changed course toward Suva.

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(30) The *Portmar* arrived at Suva on December 20, 1941, and a British Naval Control Officer, Commander Gray, accompanied by a United States naval officer, also named Commander Gray, came on board the vessel. British Commander Gray gave the Master written and oral orders to proceed to Sydney, Australia. In answer to the Master's questions as to taking orders from the British Naval Control officer, Commander Gray, U. S. N., told him that it was

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with the absolute knowledge and understanding of the United States authorities and that he should comply.

(31) At Suva, Captain Michelson tried to send a cable message to Calmar Steamship Corporation but was informed that it could not be done for security reasons. He thereupon wrote two letters to Calmar Steamship Corporation, in one of which he informed them of the foregoing events, and left the letters with one of said naval officers to be mailed.

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(32) Calmar Steamship Corporation never received these letters written by the Master at Suva.

(33) From the time the *Portmar* left Suva for Sydney, Australia, until the damage later sustained by enemy attack on February 19, 1942, every movement of the *Portmar* was directed by and in accordance with orders of the military authorities, either of the United States or of the Australian Government. All of these orders were given by these allied governments as sovereigns engaged in war and for military reasons, as well as to provide for the greater safety of the vessel.

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(34) The *Portmar* sailed from Suva on December 22, 1941, and arrived at Sydney, Australia, on December 30, 1941. Captain Michelson there reported to the Australian Naval Control officer.

(35) The Master, through his agents at Sydney, Australia, Dalgety & Company, and the United States Consul, tried to send a cable message to Calmar Steamship Corporation, but was told that it could not be done for security reasons.

(36) At Sydney, the Master received written and oral orders from the Australian Naval Control officer requiring the *Portmar* to proceed to Brisbane, Australia and there report to the Australian Naval Control officer.

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(37) At Sydney, the Master inquired of the United States Consul whether it was with their knowledge and approval that he should take orders from the Australian Naval Control and was told by the consul that he was obliged to follow such orders.

(38) The *Portmar* sailed from Sydney on January 2, 1942 and arrived at Brisbane on January 5, 1942. The Master reported to the Australian Naval Control officer at Brisbane.

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(39) The Master attempted through his agents, at Brisbane, Dalgety & Company, and through the United States consul there to send a cable message to his owners, but was informed it could not be done.

(40) In response to the Master's inquiry, the American consul at Brisbane told him that he should continue to follow the orders of the Australian military authorities, as it was with the full knowledge of the American authorities.

(41) The United States military authorities at Brisbane gave orders that the cargo on the *Portmar* was to be discharged, sorted and part of it reloaded, together with other cargo, and employed Australian stevedores to do this work. The Australian Naval Control officer at Brisbane thereupon ordered the *Portmar* to proceed to Port Darwin. Pursuant to these orders, the *Portmar* sailed from Brisbane on January 9, 1942.

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(42) While proceeding to Port Darwin according to orders, on January 15, 1942, the Master was ordered by signal to go into the harbor at Thursday Island, Torres Strait. The Australian Naval Control officer there ordered the *Portmar* to proceed to Darwin with two other American ships in convoy of two Australian corvettes. The *Portmar* arrived at Port Darwin on January 19, 1942.

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(43) From the time the vessel sailed from San Francisco until January 19, 1942, Calmar Steamship Corporation had not received any information as to the *Portmar*.

(44) On January 19, 1942, Calmar Steamship Corporation received unofficial information from Mr. Freeze of the United States Lines, who stated that the United States Lines was to be the homeward agent on the charter and that the *Portmar* was somewhere in Australia.

2159 (45) On January 22, 1942, Calmar Steamship Corporation received a teletype message from its San Francisco office stating that the *Portmar* was in Australia. On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. All the underwriters agreed, and this was confirmed by letter from Thomas Stephens & Sons, Ltd., of February 6, 1942 to Mather & Company, reading: "We have your cable of the 24th January last advising that this vessel insured for the voyages
2160 from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices."

(46) On January 19, 1942, the Master reported to the Australian Naval Control officer at Port Darwin. The United States Army authorities at Port Darwin ordered the Master to discharge the cargo from the *Portmar* as soon as a berth was available. The *Portmar* lay at anchor in Darwin Harbor until she docked at Port Darwin on January 31, 1942. The cargo was discharged, except 1500 drums of gasoline which the American military authorities ordered

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the Master to retain on board. The *Portmar* was thereupon ordered to reload 500 drums of gasoline, previously discharged, to make the amount on board 2,000 drums.

(47) The Master again attempted to send a cable message to Calmar Steamship Corporation, but was told that it was absolutely impossible, that the land lines from Darwin to Melbourne were inadequate to carry half the necessary military messages and furthermore that it could not be done for security reasons.

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(48) On or about February 4, 1942, Captain Michelson received written and oral orders from the Australian Naval Control Officer at Darwin to proceed to Wyndham, Australia, discharge the gasoline and return to Port Darwin. The Master told the United States Naval Observer at Port Darwin, Commander Collins, that he objected to being ordered about by foreign naval authorities but was instructed that it was necessary to follow such orders because of the necessity of co-operating in a desperate situation.

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(49) Pursuant to orders of the Australian Naval Control the *Portmar* sailed in convoy of an Australian corvette from Port Darwin on February 4, 1942, and arrived at Wyndham on February 8, 1942. The gasoline was discharged pursuant to arrangements made by American Army authorities. The *Portmar* sailed from Wyndham on February 10, 1942 and arrived again and anchored at Port Darwin on February 12, 1942.

(50) Pursuant to orders of the Australian Naval Control officer, the Master berthed the *Portmar* on February 13, 1942. Thereupon, on February 13 and 14, 1942, the Master of the *Portmar* was ordered by the U. S. Army Commander to discharge all dunnage and take on board a detachment of three to four hundred officers and men of the 148th Field Artillery, with their field guns, military stores, supplies,

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equipment and ammunition, and a motor launch, the *Nevbet*, belonging to the Australian Army.

(51) The Island of Timor was then in the hands of the allies of the United States. Japanese troops did not land on Timor until March 1, 1942.

(52) On the night of February 14, 1942, the Master was ordered by the Australian Naval Control officer to report on board the cruiser USS. *Houston*. The Master obeyed this order, and there met, at a convoy conference the master

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of three other merchant vessels, Captain A. H. Rooks, commanding officer of the *Houston*, and the commanders of other naval vessels.

(53) At the convoy conference the Master was handed orders by the Australian Naval Control officer which were explained by Captain Rooks, to the effect that the *Portmar* and the three other merchant vessels were to proceed for Koepang, Timor, in convoy of the *Houston*, the United States Destroyers *Preston* and *Perry* and four Australian corvettes; that it would be a very dangerous mission, that Koepang Harbor was going to be a "hot place", that he

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would escort the convoy up to the entrance but not into the harbor. Prior to this time, the Master had heard that an "*Empire Airways*" flying boat had been destroyed by enemy action en route between Darwin and Koepang on January 29, 1942; and, it was then generally known in Darwin that on February 13, 1942 the port of Koepang had been bombed by the Japanese. Pursuant to these orders the *Portmar* sailed in convoy from Port Darwin at 1:30 a.m. on February 15, 1942, carrying men and materiel to aid in the defense of Koepang.

(54) On February 15, 1942 while steaming across the Timor Sea the convoy was attacked by two Japanese planes and was ordered to disperse. Bombs dropped by those planes did not fall near the *Portmar*. Shortly thereafter

the convoy was ordered to reassemble and continue toward Koepang.

(55) On the morning of February 16, 1942 while steaming across the Timor Sea the convoy was attacked by a squadron of Japanese bombers. This attack lasted about forty-five minutes; many bombs were dropped near the *Portmar*, and she was severely shaken. After the attack, the Master received reports from the Chief Mate and Chief Engineer that the bombing had shaken paint and scale loose from the frames of the vessel, had unsettled parts of the 2168
machinery and fractured certain bilge lines. The Master observed that the vibrations of the vessel under way had somewhat changed.

(56) The point at which the convoy was attacked was about two hundred and fifty (250) miles from the route along which the *Portmar* had been directed to proceed by the instructions issued to her Master by the United States Navy in San Francisco.

(57) There is no evidence that the danger of attack by Japanese planes at the point where the *Portmar's* convoy was bombed was then any greater or less than the danger 2169
of such attack along the route originally assigned the *Portmar* by the United States Navy when she sailed from San Francisco.

(58) After the enemy attack of February 16, 1942 the convoy was ordered by the Commanding Officer of the USS. *Houston* to return to Port Darwin. The *Portmar* arrived again at Port Darwin and anchored there at 12.55 p. m. on February 18, 1942 at a position designated by the Australian Naval Control Officer. She was ordered to await her turn at a specified discharging berth, and upon reaching her turn, to dock and discharge her military supplies, equipment and personnel.

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(59) Later the Australian Naval Control officer gave orders that the *Portmar* was to be docked the next day, February 19, 1942, but that order was countermanded early the next morning. The *Portmar* remained at anchor.

(60) On February 19, 1942, at about 9.55 a. m., Japanese airplanes attacked the vessels in the harbor at Port Darwin. As a result of this attack, in addition to damage to the *Portmar* and other disasters, SS. *Neptune*, the destroyers USS. *Perry* and USS. *Preston* and a British motor ship
2171 were destroyed.

(61) When the attack began the Master ordered the life boats swung out and lowered to the main or weather deck level. The Japanese planes attacked the *Portmar* with bombs and gunfire as she lay at anchor. Two bombs were dropped close to the port side of the *Portmar*. The first bomb went through the aft life boat on the port side, completely destroying it. The bomb exploded within twelve feet of the port side of the vessel in the vicinity of the engine room, and split the forward life boat in two parts. The second bomb was dropped and exploded within fifty feet of the port side of the vessel.

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(62) At the same time the vessel was subject to continuous machine gun and aerial cannon fire by Japanese fighter planes. One of the crew was killed and several of the crew and military personnel were seriously wounded.

(63) As a result of said air attack the vessel sustained severe and extensive damage; the port side was perforated with holes above and below the water line; three of the cargo booms fell as the rigging was shot away; the decks were penetrated fore and aft; the accommodations were blasted and wrecked; the ship began to take water in the No. 4 and 5 holds through the holes near or below the water line; fire broke out in the munitions in No. 4 hold; the Master decided to beach the vessel, if possible, before she sank in the harbor.

(64) The vessel weighed anchor with difficulty due to punctures in the steam lines. Japanese aircraft continued their attacks. The engine room telegraph, the standard compass and the steering compass were demolished. The Second Officer was shot down as he stood at the engine telegraph on the bridge.

(65) The *Portmar*, navigated by the Master, proceeded to the southerly part of the harbor, anchored at 1.05 p. m. on February 19, 1942 off Channel Island, at which time the Master ordered the military personnel disembarked by the 2174
Australian corvette *Vigilante* and the launch *Nevbet*. Due to the damage to the bilge lines, sea water which entered the leaking hull could not be pumped out. As more water entered the list of the vessel to port increased. She was unable to handle her anchors or to manoeuvre to avoid attack in the event of another air raid. After she succeeded in disembarking her military personnel, her Master beached her.

(66) The Master directed the *Portmar* toward a cove on the eastern shore of the harbor. With no compasses and navigated by lead line and visual observation of the shoals, 2175
the *Portmar* grounded on her starboard side from about midships to aft at 2:12 p. m. at lat. 12° 34′ S; long. 130° 52′ E. at a point about six miles south of the town of Darwin. The mean draft of the vessel at that time was 12.11 feet.

(67) The tidal range at the point where the *Portmar* lay on the beach was about 27 feet. At low water the *Portmar* was submerged from the aft end of the ship to the aft end of midship house; at high water the water was over the poop and forward into the shelter deck.

(68) The list of the vessel to port increased with the ebb of the tide and more holes were put below water. Between 4.00 p. m. and 5.00 p. m. on February 19, 1942, the Chief Engineer reported to the Master that he could not

control the entry of water and that the boilers might blow up as the list increased. When the list increased to about 40°, the Master feared, and justifiably so, that the vessel would turn over and the boilers would explode. He personally dropped the port anchor to hold the vessel in position and ordered the crew off the vessel. They were taken off by the Australian corvette *Vigilante*.

(69) The Master ordered the Chief Officer and Chief Engineer to keep the crew together, to go to Darwin and
2177 get in touch with the American military authorities and see that the crew were taken care of. The Master and three members of the crew whom the Master asked to stay with him, went aboard the launch *Nevbet* and moved a short distance away from the ship because it was feared that she would turn over, and also because of fear of further attack by Japanese aircraft.

(70) After dark and the beginning of the flood tide the list of the ship decreased somewhat. The Master went on board the ship again with two of the men and remained most of the night. On February 20, 1942, when daylight came, the men would not stay aboard the ship because of
2178 fear of further attack by Japanese aircraft. There was no drinking water nor water for sanitary purposes, and neither steam nor electricity. The Master went with the men to the shore a little to the South of Channel Islands and hid in the mangroves. From that point the Master saw Japanese aircraft bombing the town of Darwin and the area to the south. The Master returned to the vessel several times during the day and inspected the condition of the vessel. He remained on board the night of February 20-21, 1942 and all during daylight on February 21st.

(71) Late in the afternoon of February 21st at about 4.05 p. m., the Master left the vessel in the launch and went ashore to get drinking water. Before leaving the

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vessel on that occasion he lowered the starboard anchor personally in order to prevent the vessel from getting into a worse position in the event of a cyclone, which might reasonably be expected at that time of the year. While the Master was ashore near the Channel Islands, a launch came down the harbor carrying the chief mate, Colonel Petterson, the commanding officer of the 148th Field Artillery Regiment, United States Army and Captain John Protheroe Williams, a professional salvor, who was also connected with and later employed by the Australian Commonwealth Salvage Board.

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(72) The field guns in the holds of the *Portmar* were urgently needed by the United States Army, and Col. Petterson wanted to see if the guns could be salvaged. The guns were under water as the ship then lay. Col. Petterson and Capt. Williams examined the vessel with Captain Michelson for the purpose of ascertaining where and how the artillery was stowed and considering the means of salvaging it. Nothing was said and no discussion was had of the possibility of salving the vessel.

(73) After this examination of the vessel on the evening of February 21, 1942, Captain Michelson went ashore with Col. Petterson, and Capt. Williams remained aboard the ship waiting for an Australian corvette to take him ashore. Capt. Michelson took the ship's secret documents with him and turned them in to the Australian Naval Control officer in Darwin, taking a receipt for them.

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(74) The Master tried to find a public official before whom he could note a protest but was unable to find any at Darwin. The Master then went by military truck to a United States Army camp about twenty miles south of Darwin and there reported to the commanding officer Col. La Rue. At this camp, on the evening of February 21, 1942 Capt. Michelson endeavored to send a cable message to

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Calmar Steamship Corporation but was unable to do so. He remained there overnight. On February 22, 1942, with the chief officer, Mr. Bullock, the Master returned to the *Portmar* in order to save as much of the ship's provisions as possible in order to feed the officers and crew at the camp. The Master remained on board the *Portmar* during the night of February 22-23 while a launch was taking the provisions from the *Portmar* to shore. The Master also remained on board on the following night.

2183 (75) During daylight hours while the Master was at or near the *Portmar*, he saw Japanese aircraft attack Darwin and the harbor practically every day. No bombs fell near the *Portmar*.

(76) As the *Portmar* lay aground on the starboard side, the rise of the tide caused her bow to lift and the ebb of the tide caused her bow to fall again. The Master properly considered that this inflicted severe strain twice each day on the hull of the ship.

(77) On February 23, 1942 the Prime Minister of Australia refused to consent to the diversion to the defense of
2184 Burma of a homeward-bound Australian division.

(78) A Japanese invasion of Northern Australia was momentarily expected. The American troops in that area had but few supplies and equipment and were short of ammunition. The commanding officer of one of the American regiments told Capt. Michelson that "every vehicle in my outfit is turned south and ready to go the minute the Japs come." All the civilian shops had been closed and civilians evacuated. The only authority then in Darwin was the Allied Military authority.

(79) A series of disastrous reverses suffered by the Allies (ABDA) in Malaya, both on land and sea; led to the fall of Singapore on February 15, 1942. This was followed

by the Battle of the Java Sea and Sunda Strait with the loss of USS. *Houston* and other Allied naval vessels, and the loss of the aircraft carrier USS. *Langley*, destroyed by Japanese aircraft between Australia and Java, February 27-March 1, 1942.

(80) On March 1, 1942 the Japanese invaded the Island of Java and occupied the western part of the Island of Timor.

(81) On February 24, 1942 the Master returned to the military camp and thereafter, he, the officers and crew of the *Portmar* were used by the American military authorities to unload drums of gasoline from a vessel called the *Admiral Halstead*. The discharge of gasoline was done only at night. The *Admiral Halstead* was kept at anchor in the daytime and brought into the dock at night.

(82) During the interval between February 24, 1942 and March 2, 1942, Capt. Michelson returned frequently to the *Portmar*. He applied to the Australian Naval Control at Darwin for a watchman to prevent looting of the vessel. He examined the ship on each occasion he went aboard and found Capt. Williams making preparation for removal of the guns from the vessel. He did not observe Capt. Williams doing anything toward salvage of the vessel itself. No watchmen were posted on the *Portmar* while she lay on the beach because none could be secured by Capt. Michelson. The position of the *Portmar* as of March 2, 1942 was about the same as it was when the Master left her on the night of February 24, 1942. Capt. Michelson returned to the vessel on March 3, 1942 and left her on the evening of March 3, 1942. He never saw the *Portmar* again at Darwin. Between March 3rd and 10th, the Captain and the crew were confined by the military in the camp of the 147th Field Artillery, because of a dispute as to whether or not the officers and crew of the *Portmar* were to continue to be

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used for further stevedoring work in the harbor, while they contended that troops and Australian stevedores were available for such work.

(83) While under arrest in camp, the Captain made an effort to obtain transportation for himself, his officers and crew to Adelaide in order to get in touch with the owner of the *Portmar* and report on the events that had occurred.

(84) The judgment of the Master of the *Portmar* on
2189 leaving the ship for the last time on March 3, 1942 was that salving the ship, repairing her and restoring her to her former condition was then impossible because of her condition and the general situation. There were no facilities—no ships, no mechanics and no material of any kind available at Darwin for raising, towing or repairing her; there was not a pump in Darwin with which to raise the vessel and no power to run one. Before anything could be done to repair her, she had to be moved from Darwin, two thousand miles to the nearest port; the nearest dry dock large enough to handle the *Portmar* was at Sydney. She had to be towed through waters dominated by the Japanese; after
2190 arrival in any port of Australia with facilities they would not be adequate to restore her to pre-disaster condition. There were other wrecks that had gone without assistance. No facilities were available in all Australia for raising or towing her to anyone except military authorities. Japanese continued to be expected every day. The Master's judgment was that it was highly probable that the cost of recovering and repairing the *Portmar*, if at any time this could be undertaken and accomplished, would exceed the value of the ship. His opinion on March 3, 1942 remained unchanged on March 10 and continued the same on April 8, 1942.

(85) The condition of the *Portmar*, as she lay on the beach when the Master last saw her on March 3, 1942, was

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one of widespread and general damage by bombs and aerial gunfire. The sea was running in and out of her, carrying mud, muck and fuel oil through holes in the hull; she was almost full of water in No. 4 and 5 holds, the engine room, boiler room, shelter deck and poop; the piping in the engine room and holds was shattered and bare of covering; the boilers had been shifted in their saddles and the auxiliaries had shifted in their foundations; all quarters and accommodations were demolished and shattered; the woodwork and fittings in No. 4 and 5 holds were damaged; the standing and running rigging and most of the booms were damaged and had fallen to the decks; the navigating equipment of the ship was damaged or destroyed; the ice machine and all refrigerating machinery was damaged; the decks, steam piping, smokestacks, ventilators, engine room, fire room and skylight were shattered and perforated from fore to aft; the radio house was blown off its foundation and all the instruments were damaged or destroyed; the telemotor piping and the steering controls were perforated; the lifeboats had been destroyed; and, the electric wiring in the ship had been generally damaged and broken by the effect of bomb concussion in the quarters.

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(86) The Chief Officer of the *Portmar,* who also held a master's license, confirmed the judgment of Capt. Michelson that it was highly probable that the cost of recovering and repairing the vessel would exceed her value when repaired. In the judgment of Chief Officer Bullock, the situation of the *Portmar* was hopeless as to salvage, repair and reconditioning.

(87) The military situation as of March 3rd and 10th, 1942, was that the United States Navy had abandoned Port Darwin and moved to the Exmouth Gulf, fifteen hundred miles to the southwest of Darwin. There was a small detachment, about fifty American soldiers on the Cape York Peninsula which had been otherwise completely evacuated

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down to Brisbane. A Japanese invasion of northern Australia was constantly threatened. A defense line had been set up fifteen miles north of Melbourne on the south coast. The Japanese held the Tanimbar Islands only three hundred miles away. Japanese surface craft and submarines controlled the seas, and the Japanese air force dominated the air. The situation of peril which had existed since December 9, 1941 was daily increasing.

(88) On March 10, 1942, the master, officers and crew
2195 of the *Portmar* were put on a train at Darwin; they were escorted to the train by an armed, military guard.

(89) The route to Melbourne from Darwin was by a narrow gauge railroad about 250 miles from Darwin to Birdum, thence by truck about 500 miles across the desert to Alice Springs, thence by railroad about 1500 miles via Adelaide to Melbourne.

(90) During the railroad trip between Alice Springs and Adelaide, Chief Officer Bullock saw a gondola car on a siding with large centrifugal internal combustion engine driven pumps in it. The gondola car was in a train bound
2196 the other way. He went over to the car and examined the pumps and found that they were addressed to Captain Williams at Darwin. Chief Officer Bullock told Capt. Michelson about these pumps. They were the pumps later used by Capt. Williams in pumping out the *Portmar*. They were obtained by the Australian government and sent to Capt. Williams from South Australia, 2,000 miles overland at government direction and expense. No private, individual shipowner could have obtained them or any other salvage equipment or facilities. No commercial arrangements for the towage to Brisbane could have been made.

(91) Up to the time of departure from Darwin, the Master of the *Portmar* had not been able to send any word to Calmar Steamship Corporation. When he boarded the

train at Darwin on March 10, 1942, he planned to get in touch with Calmar as quickly as possible to advise it fully of what had happened and to request and carry out its instructions.

(92) On March 22, 1942, the Master, officers and crew of the *Portmar* arrived at Melbourne. The master noted protest and extended his protest both before a notary public and the American consul.

(93) The master employed Malleson Stewart & Co., Solicitors, of Melbourne, to represent and protect the interests of the vessel and her owner, Calmar Steamship Corporation. 2198

(94) The officers and crew were repatriated from Melbourne on or before April 17, 1942. The Master remained in Australia and endeavored by all possible means to return to Darwin, and failing in this, to get information as to the situation of the *Portmar* and what was being done with her.

(95) The first salvage operations of Capt. Williams were directed toward the saving of the field guns.

(96) While working on the salvage of the artillery on the vessel, he found the ship less badly damaged than he had thought and that the vessel might be floated. Late in March or in early April Colonel Plant of the United States Army Transport Service ordered Capt. Williams to endeavor to float the vessel. By temporary patching of the shrapnel holes at low water, and utilizing the pumps and by repeating that process on successive tides, he finally got the ship free of water and kept it so with the pumps. The vessel was pumped out, by means of the pumps sent to Darwin by the Australian government, and floated on April 5, 1942. Capt. Michelson first learned that the vessel was afloat on April 13, 1942. 2199

(97) The fact that the vessel was afloat at Port Darwin did not change the master's judgment as to the hopeless situation of the vessel.

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(98) On February 23, 1942, Calmar Steamship Corporation received a telegram from War Shipping Administration advising that the *Portmar* was reported to have been badly damaged in an air raid at Port Darwin, extent of damage unknown. On March 24, 1942, Calmar Steamship Corporation received the following cable message from the master of the *Portmar*:

"SHIP ACCESSIBLE HALF LENGTH AT LOW TIDE MY OPINION EXCESSIVE DAMAGE MAKES SALVAGE IMPOSSIBLE STOP
2201 HAVE YOU ANY INSTRUCTIONS I SHOULD FOLLOW TO PROTECT OWNERS INTERESTS"

(99) On March 30, 1942, Malleson Stewart & Co., libelant's solicitors at Melbourne, sent Calmar the following cable message:

"CONSULTED BY MICHELSON SHIP FOUNDERED STOP ACCESSIBLE HALF LENGTH AT LOW TIDE BUT MICHELSON CONSIDERS CONSTRUCTIVE TOTAL LOSS STOP RECOMMEND TENDER ABANDONMENT STOP MICHELSON JUST ARRIVED AND PROTEST NOTED STOP DELAYED ARRIVAL AND PROTEST
2202 COMPLETELY JUSTIFIED STOP APPLY NAVY FURTHER PARTICULARS STOP ACKNOWLEDGE"

(100) On April 4, 1942, Calmar Steamship Corporation received the following letter dated April 3, 1942 from United States Maritime Commission, War Shipping Administration:

"April 3, 1942.

S. S. *Portmar*

Dear Mr. Warley:

On February 23rd we received advices through the Navy to the effect your SS *Portmar* was damaged in an air raid February 19th, 1942 at Port Darwin.

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We were advised the extent of the damage to the ship and further details with respect to the crew unknown.

"On April 1st we received through Navy channels a despatch from the Naval Observer, Melbourne, reading as follows:

'Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store.'

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Very truly yours,

(Signed) J. C. OUTLER
J. C. Outler
Chief, Ship Control Section
War Shipping Administration"

(101) On April 7, 1942, Calmar Steamship Corporation instructed Mather & Co., Philadelphia, to tender abandonment of its interest in SS. *Portmar* to the war risk underwriters, and on April 8, 1942, abandonment of its interest in SS. *Portmar* was tendered to the underwriters through Thomas Stephens & Sons, Ltd., London. The underwriters rejected the tender of abandonment but agreed that libelant would be in the same position as though a writ had been issued on that day.

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(102) On April 8, 1942, the condition and situation of the vessel, save that the initial step of pumping her out had been accomplished, remained as it was after her beaching, except that she had some temporary patches in the holes in her sides. She was still afloat at Darwin, but kept so only by operation of the pumps. The vessel's owner could not have arranged to retrieve and restore her to pre-disaster condition. The military situation in Australia was that the Japanese forces had driven as far east as to include all of

the Dutch East Indies and an invasion of the northern part of Australia was threatened. The United States Army Transport Service was in desperate need of every vessel afloat or which could be made to float. No regard was paid to the charter commitments or commercial considerations affecting any available vessel.

(103) After the engagement of the Coral Sea—May 4-9, 1942—the United States Army decided to tow the *Portmar* to Brisbane and arrangements were made through
2207 Capt. Williams to accomplish that towage. There was no possibility of obtaining any naval escort in waters dominated by the Japanese west of the Torres Strait. The personnel of the tug were carefully picked; they were undertaking a very hazardous voyage.

(104) The towage of the *Portmar* from Darwin to Brisbane began on or about June 25, 1942 and ended at Brisbane on or about July 29, 1942. Two tugs were employed and a riding crew was on board the *Portmar*. The tow made a long detour around Melville Island and through the Gulf of Carpentaria, following the shore line, running only by night and hiding in coves by day. They were passing through
2208 waters completely dominated by the Japanese until they rounded Cape York and got down off Queensland Coast.

(105) The reasonable out-of-pocket cost of the services and equipment furnished to the *Portmar* and to the Australian Commonwealth Salvage Board in raising and towing her from Port Darwin to Brisbane was $55,130.; the cost to a private commercial interest would have been more and the reasonable value of the services much greater. The services, facilities and equipment furnished were not available at the time to any but the military and government agencies and to those working under the direction and on behalf of such agencies.

(106) When the *Portmar* arrived at Brisbane on July 27, 1942, her master left Melbourne to meet her and arrived at Brisbane on July 29, 1942. He had a pass signed by Col. Plant of the Army Transport Service. When he sought permission to go on board the vessel and presented the pass, a sentry barred him from admission. The *Portmar* was and continued to be under the exclusive control of the United States Army.

(107) The Master then applied to Col. Grimm in charge of the United States Army Transport Service at Brisbane 2210
for leave to go on board the *Portmar*. Col. Grimm endorsed the master's pass but Capt. Michelson was again barred from the vessel. He had to get a letter from Capt. Williams in order to get on board.

(108) At Brisbane, the master of the *Portmar* employed Capt. R. Douglas Taylor, a Brisbane representative of the American Bureau of Shipping, the British Corporation and Norwegian Veritas, and his engineer assistant, Lieutenant-Commander A. G. Horn of the Australian Navy, to survey the damage sustained by the *Portmar*. Thereafter, the Master of the *Portmar* received a preliminary 2211
report of survey signed by Lt. Commander Horn and later a complete survey report signed by R. Douglas Taylor and A. G. Horn dated September 19, 1942. In the latter survey report the surveyors estimated the cost of repairing the *Portmar* in such manner as would regain for her her former Classification, at approximately £120,000 Australian. That sum, at R/Ex.3.25 was equivalent to $390,000. Such repairs could then have been performed in Australia only by military or government agencies and under their direction and control.

(109) On or about August 19, 1942, the Commonwealth of Australia through the Crown Solicitor, made demand for £100,000 Australian as an award for salvage services rendered to the *Portmar*.

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(110) Thereafter a salvage claim of £50,000 Australian was made by United Salvage Proprietary Ltd. and John Protheroe Williams, for salvage services rendered in raising and floating the *Portmar*.

(111) Temporary repairs were undertaken and performed by a military detail of the United States Quartermaster Corps under the command of Major Haggett, utilizing scrap materials available in a local shipyard and from the wreck of a Liberty ship in Brisbane Harbor.

2213 (112) The temporary repairs made by United States Army labor at Brisbane consisted in cleaning up the vessel, patching up the holes in the sides and superstructure, renewing booms and rigging, refurnishing after quarters, repairing leaks in the double bottom tanks. Holes in the hull were repaired by welding patches over the holes. The work was a patch-up job. The work done at Brisbane was not intended to and did not restore the vessel to commercial operating condition in class; under Major Haggett's orders only the minimum work was done, such as to permit the vessel to be operated in Australian waters during the war.

2214 (113) On November 17, 1942, at twelve noon Eastern Australian time, the United States, acting by and through the War Shipping Administration, requisitioned title to SS *Portmar* at Brisbane, Queensland, Australia.

(114) The *Portmar* arrived at Sydney November 22, 1942 and was there placed on drydock for examination below the water line. Some additional repairs were there made.

(115) While the *Portmar* was on dry dock at Sydney, and thereafter, a further survey of the *Portmar* was made at which the owner, the war risk underwriters and the United States were represented. After all the patch work repairs had been completed, the surveyors issued a joint

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report, dated Sydney, February 15, 1943, in which it was stated that the cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February, 1942, would amount to approximately £28,000 Australian.

(116) The estimate contained in the Sydney Survey Report dated February 15, 1943, did not adequately measure the extent of the damage sustained by the *Portmar* in said enemy attacks. The estimate was made after considerable repair work had been done on her. All but one of the surveyors who signed the report never saw the *Portmar* until she arrived at Sydney, after a large amount of repair and reconditioning at Brisbane. The Sydney estimate was not an actual figure on which tenders for repairs were to be sought from shipyards, nor were specifications for such work ever prepared. All of the repairs required by the Army authorities for military purposes had already been done.

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(117) After completion of the patch-work repairs at Brisbane and Sydney, the *Portmar* made two or three trips for the United States Army and then was torpedoed and sunk.

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(118) The sound value of the *Portmar* for all purposes of these proceedings, so far as material, was $688,000.

(119) Libelant incurred and paid expenses in maintaining the Master of the *Portmar* including lodging, meals and transportation charges, also fees of surveyors, fees and disbursements of the Melbourne solicitors and other miscellaneous expenses and disbursements in and about the Defense, Safeguard and Recovery of the vessel, and the underwriters' interest in it.

(120) The salvage claims of the Commonwealth of Australia for £100,000 Australian and of United Salvage

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Proprietary Ltd. and John Protheroe Williams for £50,000 Australian were litigated in the High Court of Australia and were defended by Calmar Steamship Corporation under agreements with the war risk underwriters herein and with the United States, that the defense of said actions was to be without prejudice to any of said parties.

(121) The suit of the Commonwealth of Australia was dismissed. The suit of United Salvage Proprietary Ltd. and Williams resulted in a salvage award of £5,000 Aus-
2219 tralian with costs of £1156.9.9. Australian, equivalent at R/ex. 3.25 to a total of $20,008.59. This judgment with costs was paid and satisfied by libelant on February 9, 1944.

(122) On January 8, 1943 the war risk underwriters herein caused Thomas Stephens & Sons Ltd. to inform libelant through Mather & Co., Philadelphia, that they finally declined any liability in connection with libelant's loss with respect to the *Portmar*, by a letter as follows:

"Cl.

Posted 8/1/43 8th January, 43.

2220 MESSRS. MATHER & COMPANY,
PHILADELPHIA

Dear Sirs:

CALMAR S/S CORPORATION

S/S *Portmar*

HULL—WAR RISK INSURANCE

Referring to previous correspondence.

Underwriters inform us that they have given further very careful consideration to this case and have taken legal opinion on the facts, and they now ask us to state their conclusions as follows.

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The facts disclose that after arrival in Australia the vessel discharged her outward cargo and thereafter operated under the orders of the military authorities.

It was in the course of these operations, on a series of local voyages to & from Port Darwin that she became a casualty. These voyages were not even performed as a result of the Owners' decision and quite clearly represented an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia.

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Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss.

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Speaking for ourselves, we have the greatest sympathy for your friends in the situation in which they are placed but it does seem to us that, on the facts, they should be able to establish the liability of the W.S.A. &/or the Australian Authorities and we earnestly hope that they may succeed in obtaining recognition of this liability without further delay.

Yours truly,

THOS. STEPHENS & SONS, LTD.,
Director.

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(Here follow the initials of R. J. Merrett, the leading underwriter and the initials of all the other underwriters.)

(123) Charter hire at the rate specified in Article 1.02 of said Charter for the period beginning February 19, 1942 and ending at noon November 17, 1942, Eastern Australian time, inclusive, amounted to $360,026.71. The expenses saved by the owner of the *Portmar* during said period amounted to $92,220. Charter hire in full was paid the
2225 owner of the SS *Portmar* pursuant to a charter party up to the time of the Japanese attack upon her February 19, 1942; no payment was made by the United States under Article 1.02 of the charter for three staff sergeants on board the *Portmar* as supercargoes, who were victualled from November 28, 1941 to February 19, 1942.

(124) At all material times after February 19, 1942, the *Portmar's* owner considered her to be a constructive total loss, made no attempt to continue to operate her pursuant to her charter to the United States and considered the charter party as terminated and at an end.

2226 These findings of fact having been made, I turn to a consideration of the

CONCLUSIONS OF LAW.

(1) This court has jurisdiction of the libel filed in Admiralty No. 133-332.

(2) This court has jurisdiction under Sections 1 and 2 of the Suits in Admiralty Act, 46 U. S. C. A. 741-42 of the libel filed in Admiralty No. 129-295, over all claims arising out of the charter.

The *Portmar* was operated "for the United States."

The *Portmar* was not owned by the United States; the charter provided that the vessel should be operated by the owner and not the charterer. It was a time or voyage

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charter and not an actual demise of the vessel. *United States* v. *Shea* (1894), 152 U. S. 178; *The Steel Inventor* (1940), 35 F. Supp. 986.

The arguments now advanced by the Government are opposed to the position taken by it in *Matson Navigation Co.* v. *United States* (1932), 284 U. S. 352, 356, 359. There it was urged that the time charter was a contract for the operation of a vessel "for the United States"; here, the contrary is urged. This is sought to be justified because of "certain peculiarities of World War I charters which 2228
expressly provided that the vessels thereby chartered to the Government were to be operated 'for the United States' and granted the Government such extensive control over the details of their operation and management as to make them in effect actually demise or bareboat charters of the vessel * * *."

It is true that in the *Matson* charter it was recited that the ship was to be operated "for the Government". The omission of the words "for the Government" in the instant charter effected no change in the status of the vessel different from that under the *Matson* charter. The *Portmar* was operated on the voyage in the Government service; it 2229
was operated "for the United States" by the terms of the charter even though the label was lacking.

The charter provided for the total and exclusive use of the vessel's carrying capacity; by its terms "the owner agrees to let and the charterer agrees to hire the vessel * * *" (Art. 1[illegible]); the compensation to be paid is stipulated at $4.70 per ton of the vessel's deadweight capacity"; this, to cover not only the use of the ship, but in full the "service to be rendered and expense incurred in its operation and maintenance, all of which undertakings are characteristically within the admiralty jurisdiction." *Matson Navigation Co.* v. *United States, supra*; 358.

The *Portmar* was employed as a merchant vessel.

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She was chartered "for trading for one round voyage" (Art. 1.01); she was privately owned and operated for the profit of the owner, in charge of a master and crew, selected and employed by the owner and responsible to it alone. That the cargo was public stores and munitions did not render "public" the character of the vessel. She was owned neither absolutely nor *pro hac vice* by the United States. Public service did not alter the merchant character of the vessel nor impart to her, when operating under the
2231 voyage or time charter, sovereign immunity.

(3) The plain purport and intendment of the insurance provisions of the charter between libelant and respondent United States of America was that libelant and its underwriters should assume all risks insured pursuant to such provisions and that respondent United States should not be liable under the charter for insured losses.

(4) The agreement of underwriter respondents to hold the *Portmar* covered for diversion to Australia modified the terms of the policies in suit and operated only to extend the coverage and war risk insurance to port or ports in
2232 Australia whilst there, and return to United States Pacific or Atlantic ports via Panama Canal.

The policies in suit were written for a round voyage. The cable of the underwriters changed and modified the coverage only to the extent of changing the port of destination on the outward voyage "to Australia" instead of "to the Philippines." Full premium had been paid and accepted for war risk cover on a round voyage. The words "to Australia" may not be torn from their context, (*O'Brien* v. *Miller*, (1897), 168 U. S. 287, 297), and the return voyage remained covered as provided for in the policies.

(5) Any departures of the *Portmar* from the voyage described in the policies in suit were made for the safety

of the vessel or under compulsion of sovereign military authorities, and were involuntary on the part of the libelant and the master. No deviation or change of voyage occurred or operated to terminate the policies or to relieve the underwriter respondents from liability.

The underwriters urge that there were deviations on the voyage of the *Portmar* from the voyage contemplated at the time the insurance was executed. That changes in the voyage were made is not disputed; that if these were voluntarily made, the policies in suit would have been voided, 2234
is not challenged. I have found that the changes in the voyage were of an involuntary nature, that they were made under military compulsion, from the necessity of existing conditions or for the safety of the vessel. It has long been settled and accepted that,

> "Nothing is more clear than the general principle that a deviation never puts an end to the insurance, unless it be the voluntary act of those who have the management of the ship. Here the state of the case excludes the idea of the deviation (as the going to Falmouth has been called) having been voluntary. The ship was carried there by force, and without 2235
> any consent of those who had the management of the ship. Deviation occasioned by force, and deviation occasioned by necessity are the same; for necessity is by force. It is no matter whether it be the want of repair, or any other immediate danger, which renders the deviation necessary. When the deviation is necessary and unavoidable it has no effect on the obligation of the insurer. * * *" *Scott* vs. *Thompson* (1805), 1 Bos. & Pul. (N. R. 181) 185; 127 E. R. 429, 431.

See also, *Aktiebolaget M. Bank* v. *American M. M. Ins. Co.* (*The Ada*) (1925), 241 N. Y. 197; *English Marine Insurance Act*, 1906, Secs. 45(1), 46(1), 49(b)(d) and (e).

2236 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

(6) All movements of the *Portmar*, including her arrival in Port Darwin on February 12, 1942, after stopping and discharging her outward cargo at Wyndham, were part of the outward voyage of the *Portmar* and under the coverage and within the war risk insurance of the policies in suit.

(7) The insured voyage was never voluntarily abandoned or terminated by libelant, the *Portmar* or her master. The dunnage was discharged from the *Portmar* on the
2237 orders of the United States Army. The route of the vessel had been controlled from the time of departure on the outward voyage. There is no evidence to support the underwriters' contention that the homeward voyage was ever voluntarily abandoned. It was only because of the intervention of a sovereign that the return voyage was not commenced. See, *North British & Mercantile Ins. Co.* v. *H. Baars & Co.* (C. A. 5, 1919), 255 Fed. 625.

(8) The *Portmar* was not intentionally exposed by libelant, her master or crew to war risks or enemy attack, or to peril or risk of damage or loss.

The Master acted in obedience to orders of his sov-
2238 ereign conveyed to him by officers of the United States Army. He obeyed without requiring the exertion of force to coerce him; it was his duty and obligation to do this, not only as a citizen of the United States, but as master of a vessel flying his country's flag.

As Lord Wright wrote in *Rickards* v. *Forestal L. T. & R. Co.*, 1942 A. C. 50, at p. 80,

> "In one sense it was a moral compulsion, but in another sense it was more because it may be assumed that he was aware that, if he disobeyed the order, his government had means of vindicating its authority if not at the moment, at least subsequently. * * *"

 2239

To constitute a restraint of princes, or a requisition or detainment, it is not essential that there should be the presence of force as distinguished from an order backed by the sanction of force. The immediate presence of sufficient military force to enforce the sovereign's orders was not lacking, however, on February 12, 1942, when the *Portmar* was seized and requisitioned. It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor.

(9) The *Portmar* was restrained and detained, and her 2240
use seized and requisitioned without condemnation or transfer of ownership by the sovereign governments of the United States of America and the Commonwealth of Australia on February 12, 1942.

(10) The "Free of British and Allied Capture Warranty" of the insurance policies in suit is not ambiguous, and expert testimony offered to explain, alter or vary its meaning has not been considered.

(11) The loss and damage sustained by the *Portmar* by reason of enemy attacks was not excluded from the coverage of the insurance issued by underwriter respondents in 2241
the "Free of British and Allied Capture Warranty" because it was within an exception to that warranty in the policies in suit.

The damages sustained by the *Portmar* were "consequences of hostilities or warlike operations" within the provisions of the F. C. & S. clause of the marine hull policies. The damages were the direct and immediate result of enemy attack, bombs and gunfire.

It has been found that there was a seizure and requisition of the use, and a restraint of the vessel at the times the damage was inflicted on the *Portmar*. It has also been found that the coverage of the policies had not terminated at the time of these acts of sovereign powers. The re-

straints under which the *Portmar* was operating were the proximate cause of the damage she sustained. *Standard Oil Co.* v. *United States (The Llama)*, (1925), 267 U. S. 76, 78.

The question presented is whether loss and damage to the vessel sustained while such paramount forces were operating are excluded from coverage by the "Free of British Capture" rider of the war risk insurance policies in suit. Were the damages occasioned by the perils insured against?
2243 This must be determined by the language employed in the rider, read in the light of the other provisions of the policy.

The wording of the rider is clear: first, it frees the underwriters of "claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies * * *." This exception, it seems, finds root in the fact that British underwriters were insuring against loss to a vessel flying the flag of the United States. *Cf., Sanday & Co.* v. *British & Foreign Marine Ins. Co.*, (1915) 2 K. B. 781. The reason for this exception is
2244 said to be that "on the principles of English law, it is not competent to any subject to enter into a contract to do anything which may be detrimental to the interest of his own country." *Arnould on Marine Insurance*, 13th ed. Sec. 85. The paramount powers which acted were among those named in the warranty; no claim is, therefore, made against the underwriters for seizure, requisition, restraint or detainment.

The second clause of the rider then continues,

> "* * * but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines, or other implements of war, or by stranding, sinking, burning or collision,

2245

provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention."

The vessel was not condemned; there was no condemnation contemplated during the seizure, restraint, requisition or taking of the *Portmar*. The taking of the *Portmar* was not "by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owner of all dominion or right of property over the thing taken." *Arnould, supra,* Sec. 829; *Andersen* v. *Marten,* (1907) 2 K. B. 248, 253, 1908 A. C. 334.

2246

The reason for the words "but unless the insured Vessel is condemned" is apparent when one considers that the change of title to a vessel condemned after capture dates back to the time of the taking, and damage to the vessel from enemy action in the interim would not be damage to the property of the assured. The very purpose of the second clause was to continue coverage to the assured while the vessel was under restraint or requisition in the event that condemnation did not follow the taking of the vessel.

2247

The losses for which libelant claims were covered by the terms of the war risk policies in suit without any reference to the rider. The rider served only to exclude certain risks arising from British capture, seizure, requisition, etc. This exclusion was, in turn, limited in scope by further exceptions, which, expressed in the second clause of the rider, render the provisions of the first clause inoperative as to the losses here claimed. The losses which were the "consequences of hostilities" remained covered under the provisions of the war risk clause because the interest of the assured in the vessel continued and was not terminated by the requisition, restraint and detainment. The damage to and loss of the vessel were excluded from the hull marine policy by the F. C. & S. clause because they occurred while

"the taking of the vessel by requisition and restraint" was in effect and as "the consequences of hostilities or warlike operations."

The losses sustained by the *Portmar* were "otherwise covered" by the policies in suit. At the time of seizure and requisition, the round trip voyage had not been completed; the vessel had not returned to a port in the United States; she had not then lost her status as a private vessel. The conditions as they existed at the time of seizure and
2249 requisition are the tests to be applied in determining whether the vessel was "otherwise covered."

Neither counsel nor I have been able to find any decision or text consideration of the second clause of the rider, but the language is plain and the policies must be read and applied as they were written.

If there had been a capture, requisition or seizure by the enemy and consequent loss by warlike operations, coverage would be beyond dispute. This total and complete coverage against capture, seizure or requisition by Great Britain or her allies could not have been written; the underwriters insured to the full extent for which they might
2250 legally contract; not against such capture, seizure or requisition, but against war risk losses during such capture, seizure or requisition, when not followed by condemnation.

The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write.

2251

This second clause cannot be read, as the underwriters now wish it to be, so as to exclude losses, after British capture, arrest, etc., save those sustained while the vessel is "being detained for inspection" or while she is being brought into a control port for condemnation. It might well have been so drafted; the simple fact appears that it was not.

The policies in suit were written and procured to cover the risks and perils of war. One of the foreseeable incidents of war is that a sovereign may seize, requisition and take a vessel. War risk insurance is written to indemnify against just such losses; premiums are paid for such coverage. The bartered protection provided for by the policies is not to be taken away by judicial action because it is claimed that the underwriters did not intend to write a coverage as broad as the language they used granted.

2252

(12) The loss and damage to the *Portmar* in suit resulted from a peril of the voyage insured and no additional premium is payable to underwriter respondents pursuant to the "held covered" clause of the policies.

The "held covered" clause becomes operative only when there is a voluntary deviation or change of voyage, made by those in charge of the vessel. "In my opinion, it entitles the shipowner, as soon as he discovers that the warranty has been broken, to require the underwriters to hold him covered. It also entitles the underwriters to exact a new premium commensurate with the added risk." *Greenock S. S. Co.* v. *Martime Ins. Co., Ltd.*, (1903) 1 K. B. 364, 367. Here, the "change of voyage was act and part of the * * * seizure." *Rickards* v. *Forestal L. T. & R. Co.*, *supra* 83. The "held covered" clause does not apply and no additional premium is due.

2253

(13) All loss and damage sustained by the *Portmar* was within the coverage of the war risk insurance issued by the underwriter respondents to the libelant.

2254 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

(14) The *Portmar* became a constructive total loss within the meaning of the policies by reason of the perils insured against by underwriter respondents.

The policies contain the following clause:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value."

2255 The American rule is that "if, after the damage is or might be repaired, the ship is not, or would not be worth, at the place of repairs, double the cost of the repairs, it is to be treated as a technical total loss." *Bradlie & Gibbons* v. *Maryland Ins. Co.*, (1838), 37 U. S. 378, 399. The English rule is that the loss is held constructively total when the cost of repairs exceeds the value of the vessel after the repairs. The policies in suit adopt the English rule.

The right of an assured to recover for a constructive total loss in the event of a disaster has been long recognized both in England (*Rickards* v. *Forestal L. T. & R.* 2256 *Co., supra*), and in the United States (*Mason* v. *Marine Ins. Co.*, (C. A. 6, 1901) 110 Fed. 452). This right is preserved to the assured.

So, too, the assured has been long given the privilege to claim a constructive total loss if there is high probability that the cost of recovering and repairing the vessel will exceed her full value when repaired (English rule), or half her value when repaired (American rule).

I do not read the "constructive total loss" clause as a waiver and surrender of the assured's right of abandonment for constructive total loss under the high probability rule. Such interpretation would oblige the assured to wait for completion of repairs, or spend the money itself to repair the vessel and thus determine, in fact, the actual

total cost of repairs before a claim. In *Klein* v. *Globe & Rutgers Fire Ins. Co.*, (*The Tornado*), 1924 A. M. C. 452, aff'd (C. A. 3, 1924), 2 F. 2d. 137, 141, where a claim for constructive total loss was denied because the probabilities did not justify it, a clause identical with those in the instant policies was before the court, and concerning it the following was written by the district judge and quoted with approval by the Circuit Court:

> "It goes without saying that the insured is not required to raise and repair the vessel, to determine 2258
> whether or not the cost would amount to more than the amount that would constitute it a constructive total loss; and, on the other hand, he is not entitled, without investigation and without due foundation of fact or extreme probability of fact, to place the entire burden upon the insurer by an abandonment. He must determine for himself whether he has the right to abandon. If he is able to show that the cost of restoring the vessel, 'so far as any reasonable calculations can be made,' would exceed the amount which would constitute it a constructive total loss, he is safe in abandoning it; but it must be remembered the 2259
> existence of the fact that it would so exceed the amount, constituting a constructive total loss, is the criterion of his right to abandon."

The clause contemplates the application of the high probability rule in determining whether a constructive total loss has occurred.

Abandonment of the insured vessel must be tendered by the assured to the underwriters, if the assured elects to have a partial loss treated as a "constructive total loss."

Concerning abandonment, Chancellor Kent wrote, in 3 *Kent Commentaries*, as follows (p. 321):

> "The right of abandonment does not depend upon the certainty, but upon the high probability of a total

2260 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

> loss, either of the property, or voyage, or both. The insured is to act, not upon certainties, but upon probabilities; and if the facts present a case of extreme hazard, and of probable expense, exceeding half the value of the ship, the insured may abandon, though it should happen that she was afterwards recovered at a less expense."

See also, *Peele* v. *Merchants Ins. Co.* (1822), Fed. Cas. No. 10,905; 3 Mason 27; *Bradlie* v. *Maryland Ins. Co.*, *supra*, p. 398; *Royal Exchange Assurance* v. *Graham & Morton Co.* (C. A. 7, 1908), 166 Fed. 32.

2261

Abandonment of the *Portmar* was tendered the underwriters on April 8, 1942; by agreement between libelant and the underwriters, that date is to be taken as the date of the commencement of this suit. The right to abandon for constructive total loss depends then upon the facts existing on April 8, 1942, and it is as to this date that the "high probabilities" must be determined. I have made factual findings that the *Portmar* was a constructive total loss on February 19, 1942, after her beaching, and that she was a constructive total loss on April 8, 1942 after she was afloat in Darwin Harbor, when abandonment was tendered the underwriters.

2262

The language of Erle, C. J., in *Adams* v. *Mackenzie* (1863), 13 C. B. (N. S.) 446, and quoted with approval by the Earl of Halisbury, L. C., in *Sailing Ship "Blairmore" Company* v. *Macredie* (1898), A. C. 593, 598, is appropriate:

> "It has been urged on the part of the underwriters that they only intended to become answerable for one of two descriptions of 'total loss,' namely, the actual total destruction of the subject-matter of insurance, and not for that which all persons conversant with insurance business understand as being a total loss. All I can say is, if they so intended they have failed to express their intention."

(15) Libelant's tender of abandonment on April 8, 1942 to underwriter respondent was justified and valid under the terms of the war risk insurance policies in suit.

It has been urged by the underwriters that the "attempted abandonment" was a nullity under the Shipping Act of 1916, Sec. 9, 46 U. S. C. A. 808, and Sec. 37, 46 U. S. C. A. 835, because it was an attempt to pass title without the consent and approval of the United States Maritime Commission to the underwriters all of whom were and are British subjects or British corporations.

2264

It may well be that such approval was not required under the circumstances; however, it is not necessary to so decide now. The negotiations between libelant and the underwriters never reached the point where a transfer of title was made. The tender or offer of abandonment by libelant was rejected. At the time of rejection, the right and authority of the libelant to transfer title in the event of acceptance was not questioned; it was not made in whole or in part the basis of the rejection. If the underwriters had evidenced a willingness to accept a tender of abandonment, the consent of the United States Maritime Commission might have been obtained, whether or not it was necessary. Its absence does not affect the underwriters' liability.

2265

(16) Libelant duly performed each and every term and condition of the war risk insurance policies in suit on its part to be performed.

(17) Libelant is entitled to recover from the underwriters the sum of $860,000, the insured value of the *Portmar* stated in the war risk insurance policies in suit, with interest from April 8, 1942.

(18) Certain monies were expended by libelant as a result of the damage and loss to the *Portmar* which constituted "sue and labor" charges within the provisions of the war risk insurance policies in suit. Libelant is entitled to recover the amounts so expended from the underwriter re-

2266 *Opinion of Ryan, D. J., with Findings of Fact and Conclusions of Law.*

spondents, in addition to the insured value of the vessel above stated.

(19) The sum of $20,008.59 in satisfaction of the judgment for salvage award with costs in the High Court of Australia was paid by libelant for the account of underwriter respondents, and is recoverable from the underwriters with interest from February 9, 1944, in addition to the insured value of the vessel and the "sue and labor" charges.

2267

(20) The *Portmar* did not sustain any loss or damage from any cause which would render respondent United States of America liable therefor under the charter.

(21) The *Portmar* became a constructive total loss on February 19, 1942 within the meaning of her charter to respondent United States of America.

(22) United States of America is not liable to libelant for charter hire in addition to the amounts already paid.

(23) Libelant duly performed all the terms and conditions of the charter to be performed on its part.

2268 (24) Libelant is entitled to a decree against underwriter respondents for $860,000 with interest on this amount from April 8, 1942, and for $20,008.59 with interest on this amount from February 19, 1944; and for an amount of "sue and labor" expenses with interest, as determined by a Commissioner to be appointed by the court, with costs.

(25) The libelant is entitled to recover from the United States of America, respondent, the sum of $238.50 with interest from February 11, 1944, the date on which the libel was filed, and is, accordingly, entitled to a decree against this respondent therefor.

SYLVESTER J. RYAN,
U. S. D. J.

Dated, New York, N. Y., May 25, 1951.

2269

Supplemental Opinion of Ryan, D. J., Fixing Rate of Interest at 6% in Ad. 133-332.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the LLOYDS UNDERWRITERS, EDINBURGH ASSURANCE CO. LTD., *et al.*,
Respondents.

Ad. 133-332

2270

RYAN, J.:

I find no unreasonable delay on the part of libellant in the prosecution of this suit. I feel that interest should be allowed; the claims asserted are based on contracts. I have only been concerned with the rate of interest to be fixed. 2271
By the "Service of Suit" clause in the policies the respondent underwriters agreed to submit to any court of competent jurisdiction within the United States and to give such court jurisdiction by accepting service of process within this district. This was a submission to the jurisdiction of the New York State courts. This clause and the absence of any provision for interest on unpaid claims implies an acceptance of the New York statutory rate of 6% (N. Y. General Business Law, Sec. 370; N. Y. C. P. A. Sec. 480). Interest is therefore fixed at that rate.

June 27, 1951.

SYLVESTER J. RYAN,
U. S. D. J.

2272

Interlocutory Order and Decree.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

2273 Ad. 133-332.

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951, before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed its decision, findings of fact and conclusions of law, it is

2274

ORDERED, ADJUDGED and DECREED that libelant Calmar Steamship Corporation is entitled to recover of and from respondents Sydney Keith Scott, et al. Lloyds Underwriters, Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co. Ltd., Fine Art & General Insurance Co., Ltd., British Law and Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., and National Provincial Insurance Co., Ltd., Insurance Companies Members of the Institute of London Underwriters, and Excess Insurance Company Limited, of London, a British corporation, respondents, according to their proportionate liabilities, the sum of $860,000 with interest from April 8, 1942; and the sum of $20,008.59 with interest from February 9, 1944; and the amount of "sue and labor" expenses incurred by libel-

ant, with interest; together with the taxable costs of this proceeding; and it is further

ORDERED that this cause be referred to John Spallone, 140 Nassau Street, N. Y. C., as Commissioner to ascertain and compute the amount of said "sue and labor" expenses with interest, and to report to this Court thereon.

Dated, New York, New York, June 27th, 1951.

SYLVESTER J. RYAN,
U. S. D. J. 2276

Stipulation.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against 2277
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.
Ad. 133-332.

This Court having heretofore found in its Finding of Fact No. 119, filed herein on May 25, 1951, that

"(119) Libelant incurred and paid expenses in maintaining the master of the *Portmar* including lodging, meals and transportation charges, also fees

of surveyors, fees and disbursements of the Melbourne solicitors and other miscellaneous expenses and disbursements in and about the Defense, Safeguard and Recovery of the vessel, and the underwriters' interest in it." and

This Court having heretofore held in its Conclusions of Law Nos. 18 and 24 that

"(18) Certain monies were expended by libelant as a result of the damage and loss to the *Portmar* 2279 which constituted 'sue and labor' charges within the provisions of the war risk insurance policies in suit. Libelant is entitled to recover the amounts so expended from the underwriter respondents, in addition to the insured value of the vessel above stated.

"(24) Libelant is entitled to a decree against underwriter respondents for $860,000 with interest on this amount from April 8, 1942, and for $20,008.59 with interest on this amount from February 19, 1944; and for an amount of 'sue and labor' expenses with 2280 interest, as determined by a Commissioner to be appointed by the court, with costs." and

The items of said expenses incurred and paid by the libelant, and claimed by the libelant to be "sue and labor" charges within the policies involved in this suit, being listed in Libelant's Exhibit 25A in the aggregate amount of $17,940.34,

It is now, solely as a compromise herein and in order to avoid the expense and delay of a reference pursuant to the interlocutory decree herein dated June 27, 1951, STIPULATED AND AGREED between the parties hereto as follows:

1. In addition to all other amounts with interest and costs recoverable by libelant according to the decisions of

this Court herein dated May 25th and June 27th, 1951 and said interlocutory decree, the final decree herein shall provide that with respect to said charges and expenses referred to as "sue and labor" charges or expenses in the above quoted Conclusions of Law, libelant shall recover of and from the respondent Underwriters the sum of $15,000 with interest on that amount from March 6, 1943. 2281

2. This Stipulation is made without prejudice to the claim of the libelant with respect to such "sue and labor" charges and expenses in any other action or proceeding and without prejudice to respondents' contentions on appeal of this case (1) that none of the expenses listed in Libelant's Exhibit 25A constitutes a "sue and labor" charge under the policies involved in this suit, and (2) that they are not liable for any of said expenses. 2282

Dated, New York, N. Y., July 6, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

MENDES & MOUNT,
Proctors for Respondent Underwriters. 2283

Notice of Appeal.

2284

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

A. 133-332.

2285

Sirs:

PLEASE TAKE NOTICE that Sydney Keith Scott, the Edinburgh Assurance Co., Ltd., Northern Maritime Insurance Co., Ltd., Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company, Ltd., and each of them, respondents in the above entitled suit, hereby appeal to the United States Court of Appeals for the Second Circuit from the decree entered herein on the 27th day of June 1951, and from each and every part thereof.

2286

Dated, New York, N. Y., July 11, 1951.

Yours, etc.,

MENDES & MOUNT,
Proctors for Sydney Keith Scott, *et al.*,
Respondents,
27 William Street,
New York 5, N. Y.

To:

KIRLIN CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway,
New York 5, N. Y.

The foregoing appeal is hereby allowed.

Dated, New York, N. Y., July 11, 1951.

HOLTZOFF, J.

2287

Respondents' Withdrawal of Their Notice of Appeal from the Interlocutory Decree Heretofore Entered Herein on June 27, 1951.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation, Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*, Respondents.

2288

Ad. 133-332.

An interlocutory decree in favor of the libelant having been entered herein on June 27, 1951, and an appeal therefrom having been filed by the respondents and having been allowed by this Court on July 11, 1951, and the libelant having now presented to this Court for settlement and signature a final decree awarding recovery to the libelant in a specified amount for all matters for which this suit was brought against these respondents,

2289

NOW, THEREFORE, in order to remove any question of this Court's jurisdiction to enter final decree herein while the appeal from the said interlocutory decree is pending, the respondents herein withdraw the said Notice of Appeal from the said interlocutory decree, without prejudice to their right to appeal from the final decree herein which

2290 *Respondents' Withdrawal of Their Notice of Appeal from the Interlocutory Decree Heretofore Entered Herein on June 27, 1951.*

has been presented for settlement and signature but has not yet been signed by this Court.

Dated: July 16, 1951.

MENDES & MOUNT,

By RUSSELL T. MOUNT,
Proctors for Respondents.

2291

Consented to

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

So Ordered.

Dated: New York, N. Y., July 20, 1951.

ALEXANDER HOLTZOFF,
U. S. D. J.

2292

Final Order and Decree.

2293

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

2294

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951, before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed hereon on May 25, 1951 its decision, findings of fact and conclusions of law; and the Court having filed herein on June 27, 1951 its decision with respect to the rate of interest applicable to the several amounts which libelant is entitled to recover from respondents herein; and the Court having filed herein on June 27, 1951 an interlocutory decree in favor of libelant against the respondents herein; and the parties hereto having entered into and filed herein a stipulation dated July 6, 1951 with respect to libelant's recovery of "sue and labor" charges or expenses with interest; and the policies involved herein issued by Lloyds, London and by The Institute of London Underwriters having provided in effect that the assurers bound themselves thereunder, each to the extent of his or its own part only and not one for any other, it is

2295

ORDERED, ADJUDGED AND DECREED that libelant Calmar Steamship Corporation recover of and from respondents,

2296 *Final Order and Decree.*

according to their proportionate liabilities as provided below, the sum of $860,000 with interest at the rate of six (6%) per cent per annum from April 8, 1942 to the date of this decree, July 16, 1951, such interest amounting to $478,446.64; and the sum of $20,008.59 with interest at the rate of six (6%) per cent per annum from February 19, 1944 to the date of this decree, such interest amounting to $8,893.82; and the sum of $15,000 with interest at the rate of six (6%) per cent per annum from March 6, 1943 to the date of this decree, such interest amounting to $7,525.00;
2297 with costs taxed in the sum of $597.00; amounting in all at the date of this decree to the Total Sum of $1,390,471.05; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder, with respect to said Total Sum of $1,390,471.05 of respondent Sydney Keith Scott and all other individual respondents who were members of Underwriting Syndicates named in the following Table, part of Lloyd's policy No. D41/11356,

(Here follows a list of the Syndicates which underwrote the Lloyd's Policy, and the amount underwritten by each Syndicate.)

2298 . . . . . .

according to the following Syndicate List attached to said Lloyd's policy,

(Here follows a list of the individual underwriters in each Lloyd's Syndicate and the proportion of the Syndicate amount underwritten by each.)

. . . . . .

be and hereby is fixed and determined by the formula $A \times \frac{B}{860,000} \times T$, in which A represents the fraction set opposite their respective names in said Syndicate List, or the figure "1", where the Syndicate consists of only one person; B represents the amount of insurance underwritten by each said Syndicate, as stated in said Table; the figure 860,000 represents the total amount of the insurance under

all policies here involved; and T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Edinburgh Assurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{30,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Northern Maritime Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and 2300
hereby is fixed and determined by the formula $\frac{30,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Fine Art & General Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{20,000}{860,000}$ x T, in which T represents said Total Sum, and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of British Law Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{16,000}{860,000}$ x T, in which 2301
T represents said Total Sum, and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Planet Assurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{4,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Elders Insurance Co. Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{2,000}{860,000}$ x T, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of National Provincial Insurance Co.

2302 *Final Order and Decree.*

Ltd. with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{14,000}{860,000} \times T$, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that the proportionate liability hereunder of Excess Insurance Company Limited with respect to said Total Sum of $1,390,471.05, be and hereby is fixed and determined by the formula $\frac{30,000}{860,000} \times T$, in which T represents said Total Sum; and it is further

ORDERED, ADJUDGED AND DECREED that libelant shall recover
2303 hereunder of and from each of said respondents interest at the rate of six per cent (6%) per annum on his or its said proportionate liability with respect to said Total Sum of $1,390,471.05 from the date of this decree until payment and satisfaction of the amount of his or its said proportionate liability therefor as above stated; and it is further

ORDERED, ADJUDGED AND DECREED that unless said proportionate liabilities of said respondents hereunder be paid and satisfied, or payment and satisfaction thereof be duly secured by a *supersedeas* bond in proper form and amount with sufficient surety filed herein within ten days after service of a copy of this decree with notice of entry on proctors
2304 for respondents, libelant shall have execution forthwith against said respondents and each of them, their goods, chattels and credits and their stipulators for costs to satisfy said proportionate liability of each of said respondents with interest as aforesaid under this decree; and it is further

ORDERED, ADJUDGED AND DECREED that libelant may at any time hereafter resettle this final order and decree, or may obtain from this Court a further order, setting forth in United States Dollars the amount of proportionate liability of each of said respondents hereunder with interest as aforesaid, and granting to libelant such other, further or different relief as may be necessary to enforce this decree.

Dated New York, N. Y., July 16, 1951.

ALEXANDER HOLTZOFF
U. S. D. J.

Stipulation. 2305

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO. LTD., *et al.*,
Respondents.

Ad 133-332.

2306

A Final Decree dated July 16, 1951 having been entered herein, whereby it was ordered, adjudged and decreed that the libelant, Calmar Steamship Corporation, recover a total of $1,390,471.05 from the respondents herein according to their proportionate liabilities, and that unless the proportionate liabilities of respondents as to said sum be paid and satisfied or payment and satisfaction thereof be duly 2307
secured by supersedeas bond filed herein within ten days after service of a copy of the said Final Decree with notice of entry on proctors for respondents, libelant have execution forthwith against said respondents and each of them, their goods, chattels and credits, to satisfy their respective proportionate liabilities with interest under the said decree, and such service of a copy of said Final Decree with notice of entry having been made, and the libelant having threatened to cause a levy of execution to enforce said decree, it is now

STIPULATED AND AGREED by and between the libelant, Calmar Steamship Corporation, and all of the respondents herein, in order to avoid such execution, as follows:

2308— *Respondents' Notice of Appeal and Allowance.*

1. Simultaneously with the signing of this Agreement, the respondents have paid to the libelant, Calmar Steamship Corporation, the said sum of $1,390,471.05 being the amount of all the proportionate liabilities of the respondents under said Final Decree, and Calmar Steamship Corporation acknowledges receipt of the said payment.

2. Said payment is made with the same force and effect as though collected from the respondents by virtue of a writ of execution under the said Final Decree, and without prejudice to appeal by the respondents from the said Final
2309 Decree or any part thereof.

Dated, New York, N. Y., July 30, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

MENDES & MOUNT,
Proctors for all Respondents.

Respondents' Notice of Appeal and Allowance.

2310 UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION, a Delaware Corporation, Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*, Respondents.

Ad. 133-332.

Sirs:

PLEASE TAKE NOTICE that Sydney Keith Scott, The Edinburgh Assurance Co., Ltd., Northern Maritime Insurance

Co., Ltd., Fine Art & General Insurance Co., Ltd., The British Law Insurance Co., Ltd., Planet Assurance Co., Ltd., Elders Insurance Co., Ltd., National Provincial Insurance Co., Ltd., and Excess Insurance Company, Ltd., and each of them, respondents in the above-entitled suit, hereby appeal to the United States Court of Appeals for the Second Circuit from the interlocutory decree entered herein on the 27th day of June, 1951, from the final decree entered herein on the 20th day of July, 1951, and from each and every part thereof.

2312

Dated, New York, N. Y., October 15, 1951.

Yours, etc.,

MENDES & MOUNT,

By RUSSELL T. MOUNT,
A member of said firm,
Proctors for Sydney Keith Scott,
et al., Respondents,
27 William Strect,
New York 5, New York.

2313

To: KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway,
New York 5, New York.

The foregoing appeal is hereby allowed.

SYLVESTER J. RYAN,
U. S. D. J.

Dated New York, N. Y., October 15th, 1951.

2314

Respondents' Assignments of Error.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

2315 SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

Respondents, Sydney Keith Scott, *et al.*, hereby assign error in the proceedings, decision, Findings of Fact, Conclusions of Law, and the Interlocutory and Final Decrees of the District Court in the above entitled suit, as follows:

1. The District Court erred in failing to find and hold
2316 that the insured voyage of the SS. *Portmar* had been broken up and terminated, and the coverage of the respondents' insurance policies had terminated, prior to the Japanese bombing of the vessel on February 15, 16 and 19, 1942.

2. The District Court erred in failing to find and hold that after the cargo of the SS. *Portmar* had been completely discharged at Brisbane on or prior to January 9, 1942, she entered upon new independent voyages entirely unconnected with and unrelated to the insured voyage described in the three insurance policies, as changed by agreement to Australia.

3. The District Court erred in holding that insurance on the SS. *Portmar*, originally for a round trip fom the

West Coast of the United States to ports in the Philippines and return, and changed by agreement to Australia, was not, at the very latest, terminated by her departure on an independent and unconnected voyage from Port Darwin, Australia, for Koepang in the Island of Timor.

4. The District Court erred in holding that insurance on the SS. *Portmar,* as a commercial vessel for a round trip from the West Coast of the United States to ports in the Philippines and return, changed by agreement to cover to Australia, continued during her use as a warship, carrying troops, guns, ammunition and a landing barge on a trip from Port Darwin, Australia, for Koepang in the Island of Timor, in an active war area. 2318

5. The District Court erred in holding that either abandonment or break-up of the insured adventure, or change of voyage, or deviation, or deliberate exposure to insured perils, or employment of the merchant vessel as a warship, is excused and rendered involuntary as between assured and its Underwriters, when caused by a risk, such as requisition or restraint, which is specifically excluded from the policy coverage.

2319

6. The District Court, having found as a fact that the use of the SS. *Portmar* was requisitioned by the Australian and United States military authorities for a voyage from Port Darwin, Australia, to Koepang in the Island of Timor, erred in holding that loss or damage during such requisition was not excluded from the insurance coverage of the SS. *Portmar* under the policy clause reading:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation

by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy
2321 (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

7. The District Court erred in holding, with respect to the above quoted clause, that——

"The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write."

8. The District Court erred in refusing to consider the evidence as to the meaning of the above quoted policy clause as set forth in the minutes of the meeting of the American Marine Insurance Syndicate, which framed the clause and promulgated it on January 18, 1940, and the testimony of Mr. William D. Winter, the outstanding American authority on marine insurance, as to the meaning of the policy

clause as understood in the American Marine Insurance market in 1941.

9. The District Court erred in failing to hold that the joint survey of the SS. *Portmar*, made at Sydney, Australia (Survey Report dated February 15, 1943, Libelant's Exhibit 49) fixed the cost of repairs necessary to restore the SS. *Portmar* to the condition she was in prior to the Japanese bombing of February 15, 16 and 19, 1942, at $91,000, and that all other surveys of the SS. *Portmar* were *ex parte* and inadmissible in evidence. 2324

10. The District Court erred in failing to find and to hold that the expense of recovering and repairing the SS. *Portmar* did not exceed the sum of $166,738.63, made up of the following items:

(a) Salvage award decreed by the High Court of Australia	$ 20,608.63
(b) Reasonable value of towage from Darwin to Brisbane—not paid, but stipulated for this sole purpose	55,130.00
(c) Cost of repair and reconditioning as agreed by all parties by joint survey report of February 15, 1943	91,000.00
making a total of	$166,738.63

2325

11. The District Court erred in failing to find and hold that the formula set forth in the policy clauses:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the vessel shall exceed the insured value"

is the sole test of libelant's right to abandon the vessel to Underwriters as a Constructive Total Loss, and that, inas-

much as the expense of recovering and repairing the SS. *Portmar* amounted to less than 20% of $860,000, the SS. *Portmar* was not a Constructive Total Loss, and the attempted abandonment thereof on April 8, 1942, was unjustified, ineffective, invalid and void.

12. Even if the District Court were correct in holding that the "high probability" rule was applicable to the libelant's claim of Constructive Total Loss and its attempted abandonment of the SS. *Portmar* to the respond-
2327 ent Underwriters on April 8, 1942, the District Court erred in holding that that rule was satisfied.

13. The District Court erred in holding that there was or could be a valid abandonment of the SS. *Portmar* to the respondent Underwriters unless the United States Maritime Commission had approved transfer of libelant's title to the SS. *Portmar* to the respondents, under Sections 9 and 37 of the United States Shipping Act—1916; and that respondents were required to state all or any reasons for rejecting the abandonment.

14. The District Court erred in failing to dismiss the
2328 libel with costs.

Dated, New York, N. Y., October 15, 1951.

MENDES & MOUNT,
Proctors for Respondents,
27 William Street,
New York 5, New York.

Final Order and Decree.

2329

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondents.

Ad. 129-295.

2330

The above entitled suit having regularly come on for trial in this Court on the 18th and 19th of January 1951 before Honorable Sylvester J. Ryan, United States District Judge, and the parties having appeared by their respective counsel, and the Court on the pleadings and proof having filed its decision, findings of fact and conclusions of law, it is

ORDERED, ADJUDGED and DECREED that libelant Calmar Steamship Corporation recover of and from the United States of America, respondent, the sum of $238.50 with interest at the rate of four (4) per cent per annum from February 11, 1944, in the sum of $70.32, with interest on said total sum, according to law from the date of this decree until paid, and it is further

2331

ORDERED that in view of the Findings of Fact and Conclusions of Law made by this Court herein on May 25, 1951, the libel herein be and hereby is in all other respects disallowed, and is accordingly dismissed.

Dated New York, New York, June 27th, 1951.

SYLVESTER J. RYAN,
U. S. D. J.

2332 **Libelant's Notice of Appeal and Allowance.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

Ad. 129-295.

2333 UNITED STATES OF AMERICA,
Respondent.

Sirs:

PLEASE TAKE NOTICE that Calmar Steamship Corporation, libelant, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the Final Decree herein dated June 27, 1951 which disallowed and dismissed the libel in all respects other than the amount of recovery allowed in the second paragraph thereof.

Dated New York, N. Y., the 13th day of September, 1951.

2334

Yours, etc.,

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant,
Office and P. O. Address,
120 Broadway,
New York 5, N. Y.

To:

IRVING H. SAYPOL,
United States Attorney,
Proctor for Respondent,
45 Broadway,
New York 6, N. Y.

The foregoing appeal is hereby allowed.

Dated New York, N. Y., the 13th day of September, 1951.

I. R. KAUFMAN,
U. S. D. J.

Libelant's Assignment of Errors.

2335

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295.

2336

Calmar Steamship Corporation, libelant above named, hereby provisionally assigns error in the proceedings, decision, findings of fact, conclusions of law and decree of this Court herein in the event that the United States Court of Appeals for the Second Circuit shall not in all respects affirm an interlocutory decree entered on June 27, 1951, and a final decree entered on July 20, 1951 in an action in this Court entitled "Calmar Steamship Corporation, Libelant, against Sydney Keith Scott, one of Lloyds' underwriters, Edinburgh Assurance Company *et al.*, respondents", Docket No. Ad. 133-332, tried together with the case above entitled, from which an appeal has been taken by said respondents, as follows:

2337

1. In that this Court held that the United States of America is not liable to libelant herein for charter hire of SS. *Portmar* for the period beginning February 19, 1942 and ending at noon Eastern Australian Time, November 17 1942, inclusive.

2. In that this Court held that SS. *Portmar* did not sustain any loss or damage from any cause which

2338 *Libelant's Assignment of Errors.*

would render respondent United States of America liable therefor under the charter of SS. *Portmar.*

3. In that this Court failed to hold that respondent United States of America is liable by reason of breach of the provisions of the last paragraph of Article 2.17 of the charter of SS. *Portmar* to indemnify libelant as to any and all amounts not recoverable from respondent underwriters in said action, Docket No. 133-332, or allowed to said underwriters as an additional premium.

2339

4. In that this Court failed to hold that respondent United States of America is liable by reason of the provisions of Article 2.11 of the charter of SS. *Portmar* to indemnify libelant as to any and all liabilities or losses sustained by or with respect to SS. *Portmar* whatsoever arising from compliance with any orders or directions of respondent United States of America or its agents, given pursuant to any Article of said charter.

5. In that this Court failed to hold that the United States is liable to indemnify libelant against any loss

2340 due to vitiation or termination of the war risk insurance of SS. *Portmar* by reason of specific orders given to the Master of said vessel by any officer or agent of the United States of America.

6. In that this Court held that the plain purport and intendment of the insurance provisions of the charter between libelant and respondent United States of America was that libelant and its underwriters should assume all risks insured pursuant to such provisions and that respondent United States of America should not be liable under the charter for insured losses.

7. In that this Court failed to hold that respondent United States of America is liable to libelant

with respect to any and all losses due to or caused by compliance with, orders or directions of respondent United States of America or its agents, without regard to whether such losses or any part thereof were insured pursuant to the charter of SS. *Portmar*, or whether any insurance thereof existed at the time of loss.

8. In that this Court dismissed and disallowed the libel herein except as to recovery allowed by the decree herein.

2342

Dated, New York, October 18, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Calmar Steamship
Corporation, Libelant,
Office & P. O. Address,
120 Broadway,
New York 5, N. Y.

To:

WILLIAM V. CONNELL, Esq., Clerk,
United States District Court, 2343
Southern District of New York.

MYLES J. LANE, Esq.,
United States Attorney,
Proctor for Respondent,
45 Broadway,
New York 6, N. Y.

2344

Government's Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

2345 UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

Sirs:

PLEASE TAKE NOTICE that the UNITED STATES OF AMERICA, respondent in the above entitled cause, hereby appeals to the United States Court of Appeals for the Second Circuit from that part of the final decree herein dated June 27, 1951, which awards the recovery to the libelant allowed in the second paragraph thereof.

Yours, etc.

2346

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

Dated, New York, N. Y., September 25, 1951.

To:

KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway, New York 5.

WILLIAM V. CONNELL, Esq.,
Clerk for the United States District Court
for the Southern District of New York.

Order Allowing Government's Appeal. 2347

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK,

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2348

United States of America, respondent in the above entitled cause, being aggrieved by the decision and order by the United States District Court for the Southern District of New York, heretofore filed herein, and by the decree entered thereon in the office of the Clerk of this Court on June 27, 1951, hereby prays that an appeal be allowed to the United States Court of Appeals for the Second Circuit.

Dated, New York, N. Y., September 25, 1951.

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

2349

Upon the foregoing petition, it is ORDERED that the appeal herein prayed for be and the same hereby is allowed.

JOHN W. CLANCY,
U. S. D. J.

Dated, New York, N. Y., September 25, 1951.

To:

KIRLIN, CAMPBELL & KEATING, Esqs.,
Proctors for Libelant,
120 Broadway, New York 5.

WILLIAM V. CONNELL, Esq.,
Clerk for the United States District Court
for the Southern District of New York.

2350

Government Assignment of Errors.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK,

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2351

United States of America, respondent in the above entitled cause, hereby assigns error in the opinion, order and decree of the District Court for the Southern District of New York as follows:

1. In that the Court held that it had jurisdiction to award a decree against respondent, United States of America.

2352

2. In that the Court entered an order and final decree directing that libelant recover the cost of certain supplies and services furnished supercargoes aboard SS. *Portmar.*

Dated, New York, N. Y., September 25, 1951.

MYLES J. LANE,
United States Attorney,
Proctor for United States of America,
45 Broadway,
New York 6.

2353

Stipulation as to Exhibits.

UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295

2354

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,
against
SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332

2355

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties hereto

1. That the following exhibits, received in evidence on trial of the above entitled suits, need not be printed in the record on appeal, but shall be reprodneed and submitted in triplicate to the Court by appellants in Ad. 133-332 on the argument of the appeals with the same force and effect as if the same had been printed:

2356 *Stipulation as to Exhibits.*

LIBELANT'S EXHIBITS

Trial Exhibit No.	Description
7.	War risk insurance policy of Institute of London Underwriters' Companies on SS. *Portmar* in the sum of $116,000.
8.	War risk insurance policy of Excess Insurance Co., Ltd. on SS. *Portmar* in the sum of $30,000.
24.	Computation of charter hire of SS. *Portmar* from
2357	February 19, 1942 to November 17, 1942.
25.	List of expenses paid by Calmar Steamship Corporation.
27.	Profile plan of SS. *Portmar*.
29.	Chart of Harbor of Port Darwin with marks made by Captain Michelson.
30.	Receipt dated February 21, 1942 given to Captain Michelson for secret codes, by Australian Naval Authorities.
33.	Marine extended protest of Axel Michelson, Master, Joseph Bullock, Mate, John B. Cumber, Chief Engi-
2358	neer, Charles H. Mathews, Deck Engineer, and Eivind Steen, A. B., before United States Vice Consul at Melbourne, dated March 25, 1942.
35.	Captain Michelson's extended protest before Edward James Hamilton, Notary Public, dated March 27, 1942 at Melbourne, Australia.
48.	Captain Michelson's account of disbursements with vouchers annexed.
53.	Chart showing proposed voyage according to Naval Orders, and actual route taken by SS. *Portmar*.
54.	American Syndicate Schedule of War Risk rates, effective February 15, 1942.

UNITED STATES EXHIBITS

Trial Exhibit No.	Description
F.	Mr. C. B. Yule's estimate, dated October 26, 1950, of costs of repairs of SS. *Portmar* if made in the United States, to put the SS. *Portmar* back in class, based on his examination of libelant's exhibit 47.

RESPONDENT UNDERWRITERS' EXHIBITS

5.	In Exhibit 5, all enclosures except form of free of capture clause No. 3 (87A-56). 2360

2. That the following Exhibits, received in evidence on trial of the above entitled suits, shall be omitted from the printed record on appeal:

LIBELANT'S EXHIBITS

Trial Exhibit No.	Description
11.	Shipping Articles of SS. *Portmar*.
28.	Axel Michelson's Marine Note of Protest on January 22, 1942. 2361
32.	Axel Michelson's Marine Note of Protest before U. S. Vice Consul, dated March 23, 1942, at Melbourne, Australia.
34.	Axel Michelson's Marine Note of Protest before Edward James Hamilton, Notary Public, dated March 27, 1942, at Melbourne, Australia.
36.	Deck log book of SS. *Portmar*, November 20, 1941 to January 20, 1942, inclusive.
37.	Deck log book of SS. *Portmar*, January 21, 1942, to February 19, 1942, inclusive.
38.	Pages of Official Log of SS. *Portmar*, February 15, 1942, to February 19, 1942, inclusive.

2362 *Stipulation as to Exhibits.*

3. That any party may submit to the Court on argumen of the appeals herein, any exhibit received in evidence o the trial of the above entitled suits.

Dated New York, N. Y.
September 28th, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Libelant.

2363

MYLES J. LANE,

By EDWARD L. SMITH,
Proctor for Respondent,
United States of America.

MENDES & MOUNT,
Proctors for Respondents,
Scott, *et al.*

2364

Order for One Record on Appeals.

2365

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

UNITED STATES OF AMERICA,
Respondent.

Ad. 129-295.

2366

CALMAR STEAMSHIP CORPORATION,
a Delaware Corporation,
Libelant,

against

SYDNEY KEITH SCOTT, one of the Lloyd's Underwriters, EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

Ad. 133-332.

2367

IT IS HEREBY STIPULATED AND AGREED that only one record be printed and filed for the appeals in the above-entitled actions.

KIRLIN CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation.

IRVING H. SAYPOL,
EDWARD L. SMITH,
Proctor for United States of America.

MENDES & MOUNT,
Proctors for Respondents Scott, *et al.*

So Ordered: 25 August, 1951.

THOS. F. MURPHY,
U. S. D. J.

2368

Stipulation as to Record.

IT IS HEREBY STIPULATED AND AGREED by and between the proctors for the respective parties to the foregoing suits that the foregoing is a true transcript of the record of the said District Court in the above-entitled suits as agreed upon by the parties.

Dated: New York, December 10, 1951.

KIRLIN, CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation, Libelant.

2369

MYLES J. LANE,

By EDWARD L. SMITH,
Proctor for Respondent,
United States of America.

MENDES & MOUNT,
Proctors for Respondents,
Scott, *et al.*, Underwriters.

2370

Clerk's Certificate.

2371

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a true transcript of the record of the said District Court in the above-entitled causes as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York, this 12th day of December, 1951, and in the 176th year of the Independence of these United States.

2372

WILLIAM V. CONNELL,
Clerk.

(SEAL)

2373

[fol. 792] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1951

Nos. 184 and 185

Argued March 4, 1952 Decided May 12, 1952

Docket Nos. 22253 and 22254

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

CALMAR STEAMSHIP CORPORATION, Libellant-Appellant,

v.

UNITED STATES OF AMERICA, Respondent-Appellee

Before: L. Hand, Augustus N. Hand and Chase, Circuit Judges

On appeals from decrees in the admiralty of the District Court for the Southern District of New York, (1) awarding damages to the libellant against underwriters for the loss [fol. 793] of its ship "Portmar" in Darwin Harbor, Australia, in February, 1942; and (2) dismissing a libel against the United States except for the victualing of two supercargoes on the same ship.

Edwin S. Murphy for the Calmar Steamship Corporation.

Walter B. Hall and Russell T. Mount for the respondent underwriters.

Edward L. Smith for the respondent, United States.

L. HAND, Circuit Judge:

I

The first of these suits was brought by the Calmar Steamship Corporation against Scott and others, underwriters upon a policy of marine insurance, covering the libellant's ship, "Portmar," for a voyage from a United States Pacific port to the Philippines and return to a U. S. Pacific or Atlantic port through the Canal. The meaning of the policy

is extremely difficult to grasp, owing to the confused and contradictory provisions in the "riders," which were attached to the ancient standard form of Lloyds, and which they completely superseded. We shall assume, however, that the labyrinth of verbiage, within which lurks whatever contract was made, is to be understood to agree that, although the ship might at the time be under the "restraint of princes," the policy should cover her loss, if that was occasioned by attacks of airplanes. We shall also assume that she became a "constructive total loss" through such attacks. These assumptions we may make because we hold [fol. 794] that the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. The "Portmar" left San Francisco on November 28, 1941, bound for Manila, laden with war supplies only. That was less than a fortnight before the Japanese attack upon Pearl Harbor on December 7th, of which the master heard by wireless on the same day, when he was 600 miles to the southwest of Hawaii. Fearing that he might encounter Japanese ships or planes if he kept on his prescribed course, he at once turned due south, awaiting further orders which he got on the 11th, and which directed him to go to Suva, Fiji Islands. That port he reached on the 20th, where he got further orders to go to Sydney, Australia, and he arrived at that port on the 30th. These, and all later, orders came either from American naval officers, or from Australian officers who had been given authority to act for American officers. By the time the ship reached Sydney, not only had war broken out between Japan and ourselves, and between Japan and Great Britain; but the Japanese had sunk the British ships "Repulse" and "Prince of Wales"; and the judge found that this, following, as it did, upon the substantial annihilation of our own fleet at Pearl Harbor, "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point * * * and establish it for an air-naval fueling base." On January 2nd the "Portmar" was ordered to go to Brisbane on the east Australian coast 529 miles north of Sydney, her cargo still unbroken, and there she berthed on the 5th. She at once received orders that her cargo "was to be discharged, sorted and part of it reloaded, together

with other cargo"; and on the 9th she left Brisbane under orders to report at Port Darwin, about 2100 miles distant, where she arrived on January 19th, after being for a part [fol. 795] of the time under the escort of Australian corvettes. Here all her cargo—both what was left of that lifted in California and what was lifted at Brisbane—was discharged except 1500 drums of high octane gasoline, which she was directed to deliver at the nearby port of Wyndham, together with 500 drums, which she had carried to Port Darwin, and which had been discharged but reloaded. On her return—apparently light—from Wyndham to Port Darwin, she was laded with another military cargo—including field pieces, a naval launch and ammunition—to reinforce the defence of Koepang across the Timor Sea, north of Australia. With this cargo and a contingent of troops on board she set out on February 15; but when 250 miles out she was on the next day attacked by Japanese planes, and was ordered back to Port Darwin where she arrived on the 18th. While in the roads awaiting a berth to discharge, she was attacked on the 19th by swarms of Japanese planes and through "near misses" and gunfire suffered injuries that eventually forced her master to beach her, and, as the libellant asserts, made her a "constructive total loss."

Even though we take all the other issues in the libellant's favor, the crucial question remains whether the dominion asserted over the "Portmar" by the American and Australian military authorities beginning at Brisbane had before February 19th put an end to the possibility of that return voyage for which alone the underwriters meant to insure her. From the time she was taken over at that port on January 5th until she was riddled by gunfire on February 19th, she had been under the absolute control of military authorities; no dominion could be more complete than, after discharging all but a small part of her outbound cargo at Brisbane and Port Darwin, to lade her with a partially new cargo, order her to Wyndham, fetch her back to Port Darwin, and set her out again as part of the military expedition to Koepang, upon so dangerous a mission that the com- [fol. 796] mander of the cruiser which was to act as an escort, told her that he would not risk his ship in the harbor of Koepang. The extent of this dominion being so comprehensive and absolute, the only question is as to its prospec-

tive duration. Was it certain to last beyond any period which the underwriters assumed that the return voyage would take; or if it is impossible to be "certain," was it for practical purposes beyond reasonable doubt that it would? That depended upon the condition of affairs in Australia during January and February, 1942. The testimony is uncontradicted that everyone responsible for the defence of that continent believed that its northern coasts at any rate were in the direct straits, and that the shortage of shipping was one of the most pressing dangers. Until the naval battle of the Coral Sea which was in May the Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed.

We might indeed take judicial notice of much of this; but it is not necessary to do so for the same conclusion is inescapable from the testimony. Those in charge of the defence of the country seized and held anything that would float throughout the rest of 1942, and perhaps longer. Plant, an American Colonel, arrived at Melbourne at the end of March, as "Chief of War Transportation in the Southwest Pacific area, to organize and to operate water transportation down there." Immediate invasion of the northern part of the continent was threatened; the navy had abandoned Port Darwin; even the east coast down to Brisbane had been ordered evacuated. The army and navy took control of "every vessel we could get our hands on." There were not many, because Great Britain "had drawn practically all coastal ships from Australia," whose "life depends upon coastal shipping and they were desperate for covering their own needs, so we"—the military—"had very few [fol. 797] Australian vessels we could depend upon. * * * We were looking around desperately for anything that was afloat or could be made to float," and Australia had few repair yards. It made no difference whether a vessel was owned or chartered by the U. S. or by anyone else; military considerations alone governed, commercial were disregarded.

The extremity of the need for ships is illustrated by what was done in this very instance. The "Portmar" for a week after the attack lay beached at some distance from Port Darwin, subject to a tidal rise and fall of 27 feet; most persons thought her worthless, indeed the libellant still

strenuously maintains that she was not worth her repairs. Stowed in her holds were a number of field pieces which were sorely needed and it was found possible to unlade and salve them. In the process the officer in charge came to believe that the hull also might be salved, since there appeared to be no structural damage beyond the openings made by the concussion of shells and by gunfire. Therefore, after the lower holes had been plugged at low tide, she was floated and brought back to Port Darwin when she was enough reconditioned to venture upon a trip back to Brisbane. The earlier part of this was infested with Japanese ships and planes, and the ship, in charge of a picked crew though not under her own power, had to lie concealed in some bight during the day and move only at night. Moreover, this required her to hug the coast, and very greatly increased the distance to be covered. At Brisbane she was repaired and was later put in drydock at Sydney. The total cost of the repairs was $91,000, to which should be added $55,000 for towage and $20,000 for salvage: $166,000 in all. When all was done, it did not restore her to "commercial operating condition"; "it was strictly a patch job"; it made her "perfectly seaworthy but without any thought of restoring" her "to commercial operating condition," [fol. 798] though enough to permit her "to be operated in Australian waters." The War Shipping Administration took title to her on November 17, 1942, and she made a few trips before she was torpedoed and sunk.

These facts seem to us to prove as well as practical affairs permit that when she was taken over at Brisbane it was practically certain that she would continue to be employed in military service for a period far extending beyond her return voyage, a period which in every probability would outlast the year and certainly would extend over six months. We do not forget that on January 19th the libellant learned from one, Freeze, a traffic manager of the U. S. Lines that Lavino & Company, who supplied the Bethlehem Steel Company with large amounts of ore, "was going to load a cargo of chrome ore at New Caledonia for discharge at Philadelphia." Freeze had been the agent of the Maritime Commission for the charter in suit, and it was from him that the libellant first learned that the "Portmar" had reached Australia. He said that the ship

would load on her return voyage the latter part of February, for discharge at Philadelphia about the middle of April. This testimony was hearsay, it is true, but the respondents did not object to it and it was admissible.* However, it proved at most no more than that the Maritime Commission on January 19th still meant the "Portmar" to complete the prescribed voyage by a return to the U. S.; and that was the day on which she had arrived at Port Darwin, a fortnight after she had reached Brisbane. There is no evidence that the Maritime Commission knew the uses to which the military authorities in Australia had already put [fol. 799] her and were intending to devote her. Nor is there any reason to suppose that if it had known, it would, or indeed could, have taken her out of the control of the military. The termination of the voyage depended upon the purposes of those who had power to direct her movements; their purposes alone counted in determining whether the insured risks still continued. While it is true that the "requisition for title" was not made until November, that indicated no more than that only then did they resolve to make their possession permanent. It did not indicate that they had not from the beginning meant to use her as long as their critical needs lasted, or that those needs would not continue throughout the year. The impending Japanese seizure of at least the whole north coast, whether it succeeded or not, would result in an emergency that would be anything but temporary.

The question is whether the policy survived the seizure. The case for the plaintiff can be put most plausibly as follows. It is true that in the "rider" marked "B.C.2" the underwriters agreed that the "restraint of princes" should excuse their undertaking, but to this they made some exceptions, among which were losses caused by "gunfire * * * or other implements of war." Granted that it is

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* *Schlemmer* v. *Buffalo, Rochester & Pittsburg Ry. Co.*, 205 U. S. 1, 9; *Diaz* v. *United States*, 223 U. S. 442, 450; *Kansas City Southern Ry.* v. *Albers Commission Co.*, 223 U. S. 573, 596; *Rowland* v. *St. Louis & San Francisco R. R. Co.*, 244 U. S. 106, 108; *Continental Oil Co.* v. *United States*, 184 Fed. (2) 802, 813 (C. A. 9).

necessary to find in the maze of documents outside "B.C.2" some added provision that the losses were "otherwise covered by this policy"; such a provision is to be found in the "rider" marked "F-300," which insures risks of "military or naval aircraft and/or other engines of war." Hence it appears that notwithstanding that she might at the time be under "restraint of princes," she was insured against exactly that kind of loss which she suffered. Having expressly so dealt with the subject of "restraints of princes," and having provided when they should excuse liability and when they should not, the underwriters may [fol. 800] not now argue that, although the loss was one of those which they had accepted, they are not liable because the "restraint" was of an especial kind: *i.e.*, one which had already caused a "frustration" of the voyage. If they had intended not to cover all "aircraft" losses which might occur during a "restraint of princes," they should have said which of such "restraints" they meant to exclude.

Although this has a literal plausibility, it overlooks the fundamental subject matter of the insurance: *i.e.*, the "Portmar" on the prescribed voyage. All provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose. We do not forget that the policy contained the following exception: "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by restraint of kings" etc. Neither party has argued that this applies to the loss of the ship; and in fact it does not, for it is limited to claims for losses of the voyage as such, not of the ship. Yet a possible argument might be made that this excuse of the underwriters in the case of a "loss of or frustration of the voyage or adventure" excluded all excuses for any other kind of loss arising from a "frustration" of the voyage, under the principle: *expressio unius, exclusio alterius.* That would be an illegitimate inference. The clause only excused a loss which had to occur while the policy was in force: *i.e.*, the policy would not have ended before the loss occurred; and the loss in question, as we shall show, occurred after it had ended.

We have found no decision under a marine policy which is certainly relevant, but there are two cases in our courts and one in England, where the question arose as to whether

the owner or the charterer was entitled to the ship's earnings after requisition, and the controlling considerations are relevant to those which should control here. We held [fol. 801] in *The Claveresk*, 264 Fed. Rep. 276, that the owner was entitled to the requisition hire even on a time charter which had still fourteen months to run and which contained a "restraint" clause, and the Fourth Circuit held the same in the case where the charter had over three years to run. *The Isle of Mull*, 278 Fed. Rep. 131. The House of Lords in the well known case of *F. A. Tamplin S.S. Co., Ld.* v. *Anglo-Mexican Petroleum Co., Ld.* (1916), 2 A. C. 397, discussed the situation more thoroughly than any other court has done, and, although the decision was in favor of the charterer by a three to two vote, the opinions—"speeches"—of three of the judges—the two dissenters and one of the majority—did not differ as to the proper principle, though one of them did as to its application to the facts. The charter had been for five years, of which nearly three remained when the Crown requisitioned the ship in December, 1914, only a few months after the outbreak of the war. Lord Parker of Waddington and the Lord Chancellor, Lord Buckmaster, did indeed hold that, even though it had been proved,—which they thought it had not—that the requisition would in all probability extend beyond the remainder of the term, the interruption was covered by the "restraint clause"—because a time charter is not a contract for a specific venture, but for any uses to which the charterer may order the ship to be put. Apparently, they would have held for the charterer in any event. The other three, Lord Loreburn, Lord Haldane and Lord Atkinson, held that, if the interruption were reasonably likely to exceed the term, the stipulated venture—though a time charter—had come to an end. Lord Loreburn, however, thought that in fact the requisition might turn out to be only an interruption, and, if so, that it was within the "restraint" clause, while Lord Haldane and Lord Atkinson thought that the prospective duration of the requisition was too indefinite to be classed as an inter-
[fol. 802] ruption. The point upon which all agreed is that, had the case involved a voyage charter, the owner would have succeeded, provided it was reasonably sure that the requisition would extend beyond the limit of the pro-

posed voyage. In *Texas Company* v. *Hogarth Shipping Co.*, 256 U. S. 619, the charterer in a voyage charter sued for damages because the ship was requisitioned, but was defeated because the requisition had "frustrated" the venture: *i.e.*, the continued availability of the ship to the charterer. However, since there appears to have been no "restraint" clause, the point now at bar was not involved. In *"The Kronprinzessin Cecilie,"* 244 U. S. 12, a shipper sued the ship for failure to perform a bill of lading which did contain a "restraint" clause. The main contention was that in fact there had been no "restraint," but the court did not find it necessary to pass on this, because the presence of the "restraint" clause did not forbid the inference of an implied condition that the ship need not expose herself to capture. In all such cases the prospective length of the interruption on which the putative "frustration" depends, must be decided by the situation as it appears at the time of the interruption.*

It appears from the foregoing decisions that in a time charter, not only does a "restraint" clause not extend the prescribed period, but that if the "restraint" is likely to last beyond the term, it presently puts an end to the charter. Logically it might be thought not to do so, at least so long as the ship was put to uses to which the charterer might have put her. In such cases, if the charterer was content with the requisition hire, there would seem to be no objection to allowing him to receive it, provided he paid the charter [fol. 803] hire.** Other considerations apply to the case of a voyage charter, in which the charterer becomes entitled only to direct the services of the ship between the *termini* prescribed, and within the period customary in such cases. When such a charter contains no "restraint" clause, it is hard to see how any "restraint," involving as it must a deviation, can fail to "frustrate" the venture, unless it is trifling. When the charter does contain a "restraint"

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* *Borup* v. *Western Operating Corp.*, 130 Fed. (2) 381 (C. A. 2); *Jackson* v. *Union Marine Insurance Co.*, L. R. 10 C. P. 125.

** *Earn Line S. S. Co.* v. *Sutherland S. S. Co.*, 254 Fed. Rep. 126, 131, 132.

clause, it must however excuse some deviations from the limits, prescribed both in time and route; but it is not clear just how extensive these may be, except that they should not postpone the completion of the voyage to a time when the purposes of the "venture" have ended, commercially speaking, even though, physically speaking, the ship may still complete the voyage. A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the "restraint" clause should be construed as it would between the owner and the charterer. Of course the underwriter does accept some extension of his liability upon such risks as he continues to assume pending the "restraint"; but he should not be taken to accept extensions that, commercially speaking, put an end to—"frustrate"—the venture as the parties contemplated it. It is obviously impossible to lay down in general terms what such extensions will be; each case must depend upon its circumstances, but it is clear that the importance of the extension will depend, not only upon its length, but upon the changes in the risks to which the new employment of the ship will expose her while it lasts. In the case at bar the requisition added so notably to the risks of the prescribed voyage that the voyage ceased to be the same. In the first place, although the round voyage was expected to be from the end of November to the middle of April—less [fol. 804] than five months—the duration of the requisition at the very shortest estimate would have been twice that length, and probably more nearly three times as much. But that was not the only change which it effected in the risks, though it would really have been enough to put an end to the policy. A round voyage from San Francisco to Australia and Philadelphia was one thing; and it was a very different thing to an underwriter from the same voyage, broken by an interlude of six months or more of hovering about the coasts of Australia in the year 1942, exposed to the continuous and unimpeded attacks of Japanese planes and naval vessels, especially should the ship chance to be used, not only to carry materials for defence, but as a transport. It seems to us that so much to deviate from the prescribed voyage was to substitute a quite different voyage and that the change may not justly be regarded as provided for by the conventional clause providing for a "restraint of princes." We are not referred to any decision which has

held that that clause permits so wide a departure from the subject matter of the policy. As in all such cases, we must interpret the written words by trying to place ourselves in the position of the parties, had they been faced in advance with the actual event: the seizure at Brisbane. After making every allowance for the *canon contra proferentem* and its especial application to an insurer, we cannot believe that they would have agreed that the clause so far transmuted the undertaking. We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship.

Decree reversed; libel dismissed.

II

It remains to consider the suit of the libellant against The United States. If the charterer had so wished, the ship [fol. 805] might have been employed either in "foreign commerce," or to carry "commodities essential to the national defence"; but, according to the finding, she lifted only "high octane gasoline in drums * * * at Oakland, California, and military equipment, supplies and ammunition * * * at San Francisco," all en route for Manila. The gasoline was concededly destined for war planes, so that in fact she was used to carry nothing but "commodities essential to the national defence": i.e. war material; and it is abundantly established that such a ship, while so employed, is not "employed as a merchant vessel." In the *Western Maid*, 257 U. S. 419 the Supreme Court considered the immunity from lien of collision of three ships, of which the "Western Maid" was one. She was owned by the U. S. and had been employed as a transport, but at the time of the collision she was "loaded with foodstuffs for the relief of the civilian population of Europe." In answer to the assertion by the U. S. of its sovereign immunity the libellant "suggested" that she "was a merchant vessel," which the court answered by saying (p. 432) that "she was engaged in a public service that was one of the constituents of our activity in the war and its sequel and had no more to do with ordinary merchandizing than if she had carried a regiment of troops." Although the collision had occurred before the passage of the Suits in Admiralty Act, it was after that of the "Shipping Act, 1916,"* § 9 of which made all vessels "purchased,

* 39 Stat at L., pp. 728-738.

chartered or leased from the Board * * * while employed solely as merchant vessels * * * subject to all laws, regulations and liabilities governing merchant vessels." Thus, substantially the identical words in a substantially identical context were involved, and the "Portmar", was certainly not "employed as a merchant vessel" during the period [fol. 806] here involved. We decided the same point in *Bradey* v. *United States*, 151 Fed. (2) 742, as did Judge Ward in the *Norman Bridge*, 290 Fed. Rep. 575 and Judge Augustus N. Hand in *United States* v. *City of New York*, 8 Fed. (2) 270; and the Supreme Court at least recognized the doctrine again in *U. S. Grain Corporation* v. *Phillips*, 261 U. S. 106, 111. That ends any possibility of basing the libel upon the Suits in Admiralty Act,"* because that act annexes as a condition to the consent of the U. S. to be sued that the vessel as to which the claim arises shall be "employed as a merchant vessel." This appears from the following analysis the first two sections of the act. Section 2 gives such a consent "in cases where if such vessel were privately owned or operated," the claimant might sue in the admiralty. "Such vessel" refers back to § 1 which describes the vessels which shall be exempt from "arrest and seizure" as those which the U. S. "shall own," or which shall be in its "possession," or which shall be "operated by or for" it. It is obvious that a vessel under a voyage charter to the United States is operated "for" the United States—indeed, were it not so, "for" would be redundant. Hence the condition that the vessel shall be a "merchant" vessel attaches to a vessel under a voyage charter.

We cannot understand what is the significance of the fact that the "Portmar" was not a "public vessel" and that no suit would lie under the "Public Vessels Act,"** unless the argument be that, if there be no relief under either the Suits in Admiralty Act or the Public Vessels Act, we should assume that a suit will lie for the *casus omissus*. In the first place it has not been decided that the libellant has no relief in the Court of Claims; and, even though it does not,

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* §§ 741, 742, Title 46, U. S. C.

** §§ 781, 782, Title 46, U. S. C.

[fol. 807] certainly we may not imply a consent by the United States to be sued when it has not expressly agreed.

The decree for $238.50 presents a theoretical difficulty. The libel asked for damages upon three claims: the first, for hire; the second, for failure to insure; the third, for exposing the "Portmar" to enemy attack. We are not clear under which of these the claim for victualling the supercargoes should fall. Moreover, we do not find it necessary to decide whether, if it can be regarded as a separate claim, the District Court had jurisdiction to decide it under the Tucker Act. It was not so pleaded, nor has the libellant suggested anything of the sort. We hold that it was part of the larger claim, and that as such the District Court had no jurisdiction over it.

Decree reversed and libel dismissed for lack of jurisdiction.

[fol. 808] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of May one thousand nine hundred and fifty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

CALMAR STEAMSHIP CORP., Libellant-Appellant,

v.

UNITED STATES, Respondent-Appellant

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court

be and it hereby is reversed and libel dismissed for lack of jurisdiction in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 809] [Endorsed:] United States Court of Appeals for the Second Circuit. Calmar Steamship Corp. v. United States. Judgment. United States Court of Appeals, Second Circuit. Filed May 12, 1952. Alexander M. Bell. Clerk.

[fol. 810] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 12th day of May one thousand nine hundred and fifty-two.

Present: ——, ——, ——, Circuit Judges

CALMAR STEAMSHIP CORP., Libel-ant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) Alexander M. Bell, Clerk.

[fol. 811] [Endorsed:] United States Court of Appeals for the Second Circuit. Calmar Steamship Corp. v. Sydney Keith Scott, et al. Judgment. United States Court of Appeals, Second Circuit: Filed May 12, 1952. Alexander M. Bell, Clerk.

United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 185 - October Term, 1951.

CALMAR STEAMSHIP CORPORATION,
Libelant-Appellee,

against

Ad: 133-332.

SYDNEY KEITH SCOTT, *et al.*,
Respondents-Appellants.

PETITION OF CALMAR STEAMSHIP CORPORATION FOR REHEARING.

KIRLIN CAMPBELL & KEATING,
Proctors for Calmar Steamship Corporation, Appellee.

EDWIN S. MURPHY,
IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Counsel.

CAMPBELL CASE 1952 SECOND CIRCUIT

United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 185 - October Term, 1951.

CALMAR STEAMSHIP CORPORATION,
Libelant-Appellee,

against

Ad. 133-332.

SYDNEY KEITH SCOTT, *et al.*,
Respondents-Appellants.

PETITION OF CALMAR STEAMSHIP CORPORATION FOR REHEARING.

The libelant-appellee, Calmar Steamship Corporation, respectfully petitions for a rehearing and reconsideration of this Court's decision of May 12, 1952 in the above entitled case. As hereinafter shown, the decision is founded on assumptions of fact which could not have been made unless the Court had overlooked certain facts of record not mentioned in the opinion; and because the decision misconstrues a common form of marine insurance policy in such a manner as to deprive the assured of protection in a contingency expressly provided for in the policy.

SUMMARY OF THE GROUNDS FOR THIS PETITION.

This Court reversed the District Court's decree which had awarded libelant recovery against the respondent war risk underwriters for the loss of libelant's steamer *Portmar* on February 19, 1942, at Port Darwin, Australia, as the result of bombs and gunfire from Japanese aircraft.

The basic ground of the decision was that respondents' "policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. * * * We hold that the voyage ended at Brisbane [January 5-9, 1942] and that the policy then

ceased to cover the ship." *Slip Opinion*, pages 1175 and 1185.

The foregoing holding was expressly based upon two subsidiary propositions of fact which were erroneously assumed by the Court. Those propositions were:

I. That respondents' policy merely insured the *Portmar* "for a voyage from a U. S. Pacific port to the Philippines and return to a U. S. Pacific or Atlantic port through the Canal" and that such voyage was "frustrated" at Brisbane by the military orders which sent the *Portmar* to northern Australia.

The record shows, however: (A) that an express agreement was made between underwriters and libelant as of February 6, 1942, extending the policy to cover the vessel during its diversion to Australia on the outward voyage under government orders; and (B) that the policy *when issued* contained an express provision that the vessel should be:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

II. That the requisition at Brisbane "frustrated" and terminated the insured voyage because "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer," and because "the underwriter * * * should not be taken to accept extensions that, commercially speaking, put an end to—'frustrate'—the venture as the parties contemplated it." *Slip Opinion*, page 1184.

The record shows, however: that there was no frustration or termination of the charter at Brisbane

because the charter expressly provided, by Article 2.27, for its continuance, notwithstanding that orders might be given by any government changing the voyage, and because our government, as charterer, continued to pay the charter hire up to the time when the vessel became a constructive total loss on February 19, 1942.

In short, the decision assumes that the contingencies which occurred were not within the contemplation of the parties to the charter or the insurance policy, whereas the record clearly shows that such contingencies were expressly provided for in both documents.

The libelant did everything that a prudent shipowner could do to place war risk insurance which would be coextensive with the time and area of the vessel's employment under the time charter, by insuring the vessel not only for the voyage specifically described in the charter, but also in the event of deviation from or change of that voyage.

The foregoing points will be fully shown in the points of argument which follow.

I.

THE UNDERWRITERS' AGREEMENT OF FEBRUARY 6, 1942 AND THE "HELD COVERED" CLAUSE OF THE POLICY BOTH NECESSITATE RECONSIDERATION OF THIS COURT'S HOLDING THAT THE POLICY CEASED TO COVER THE *Portmar* WHILE AT BRISBANE JANUARY 5TH-9TH, 1942.

a. The Agreement of February 6, 1942.

On January 24, 1942 Mather & Co., Philadelphia, Calmar's brokers, sent a cable message to their correspondents in London, Thos. Stephens & Sons, Ltd., as follows:

* * *

"PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES

MATHER CO"

The foregoing cable was submitted by Messrs. Stephens to the underwriters and was initialled by each of them during the period January 26-February 6, 1942.

Record, fols. 1756-1758.

On February 6, 1942 Thos. Stephens & Sons, Ltd. wrote to Mather & Co. a letter dated February 6, 1942, as follows:

"THOS. STEPHENS & SONS, LTD.
Insurance Brokers,
52, Cornhill, E. C. 3.
and at Lloyd's, E. C. 3.

London, 6th February, 1942.

Dear Sirs,

Calmar S/S Corporation,
Portmar /S/ Hull War Risk Insurance.

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.

We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director."

HS/OD

Record, fols. 1777-1779.

The District Court made the following finding of fact:

"(45) On January 22, 1942, Calmar Steamship Corporation received a teletype message from its San Francisco office stating that the *Portmar* was in Australia. On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. All the underwriters agreed, and this was confirmed by letter from Thos. Stephens & Sons, Ltd., of February 6, 1942 to Nather & Co. reading: 'We have your cable of the 24th January last advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders. We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.'"

Record, fols. 2159-2160.

All the above facts were referred to on pages 8 and 32 of our main brief.

No further information as to the movements of the vessel was received by Calmar until after the disaster.

On February 19, 1942 (New York date) Calmar received a letter from the Maritime Commission to the effect that the *Portmar* arrived at Darwin on February 12, 1942. Groom, Record, fols. 435-436. The enemy attack on the *Portmar* had already occurred (Australian date). The next word came on February 23, 1942 when I. M. Holt of the War Shipping Administration telegraphed Calmar that the *Portmar* had been reported through British channels to have been damaged in an air raid at Port Darwin. *89th Finding of Fact;* Record, fol. 2200. Thus no "further advices" could be given by Calmar to the underwriters before the loss.

This Court has repeatedly held that findings of fact by the Trial Judge will not be disturbed when they are supported by the evidence. The above findings were founded on uncontroverted evidence.

It seems manifest that this Court erred in holding that the insurance terminated on January 5, 1942, overlooking the fact that by express agreement it was continued, or reinstated, when the underwriters on February 6, 1942 agreed to the request contained in Mather's cable of January 24, 1942.

The decision of this Court, without giving any effect whatever to that agreement,* holds that Calmar was stripped of its war risk insurance by events which were beyond its control, consent and knowledge, and that after January 5, 1942 it was uninsured against the disaster that occurred on February 19, 1942 even though the underwriters had agreed on February 6, 1942 that the vessel would be held covered "pending further advices".

Thus, if the decision of this Court on May 12, 1952 remains unchanged, Calmar was subjected to as vicious an entrapment as could be imagined. The shipowner, having no knowledge of the extent of the military controls in Australia, sought confirmation of its insurance. The underwriters, being expressly informed by Mather's cable message that the *Portmar* was "diverted to Australia on outward voyage under government orders," nevertheless agreed to hold the vessel covered. If the underwriters had notified Calmar that they refused to "hold covered", Calmar would have had a chance to obtain other insurance. As the underwriters did not decline Calmar's request, Calmar assumed that the request was granted, as indeed it actually was. If there ever was a case for estoppel, this is it. This Court should not countenance the underwriters' contention that they were discharged from liability under the policies by a restraint which occurred on January 5, 1942, in view of the fact that on or about February 6, 1942 they agreed to hold the vessel covered.

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* *Record*, fols. 470-471; 2152-2153, 2154, 2156, 2161.

b. The "Held Covered" Clause of the original policies.

Apart from the foregoing, the decision of this Court did not even refer to the fact that, *when issued,* the policies in suit contained a "Held Covered" clause as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

Policies, Libelant's Exhibits 6, 7 and 8; *14th Finding of Fact, Record,* fols. 2141-2142.

The "Held Covered" clause was quoted in our main brief at page 5 and discussed at page 32.

The obvious purpose of the "Held Covered" clause is to prevent the termination of insurance protection even in cases where the vessel may have *voluntarily* departed from the limits of the voyage specifically described in the policy.

The uncertainties arising under war conditions are among the very contingencies contemplated by the clause. The recent 3rd Edition of Winter on "Marine Insurance," contains the following statement at page 162:

> "* * * During the following World War II the usual channels of overseas commerce were so congested, and in many cases so disrupted, that the Institute warehouse-to-warehouse clause left the merchant in a very difficult position. It was not possible for him to know or to find out whether his shipments were proceeding to their destination in an orderly manner or were being subjected to unusual delays or being forwarded over unusual routes. To assure the merchant that his shipment would continue to be covered notwithstanding such interruptions, underwriters agreed, for an additional premium, to protect the shipment during such interruptions under the terms

of the following *marine extension clauses*. Often the rate charged for this additional protection was much greater than the basic rate charged for normal transits."

Again at page 169 Mr. Winter states (after quoting a "Held Covered" clause):

"* * * As deviation in the case of time hull insurance would automatically void the policy for the remainder of the policy term, a deviation clause similar to that in cargo policies is inserted, * * *."

We have never contended that these policies were continued in effect solely by virtue of the "Held Covered" clause, because that clause has been held necessary only in the event of *voluntary* deviation or *voluntary* change of voyage. It has been held to be unnecessary where the deviation or change of voyage is *involuntary* on the part of the assured. *Rickards et al.*, v. *Forrestal etc., Co.*, [1942] A. C. 50, 82-83, 109-110.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect where deviation or change of voyage occurs *with the consent* of the assured, *a fortiori* the insurance should be held to continue in effect in a deviation or change of voyage *without the consent or control* of the assured, or the Master of the vessel. And even though it were held that the underwriters are entitled to an additional premium herein, under the "Held Covered" clause, such premium should not exceed 6½%. It was proved that the American Marine Insurance Syndicate on February 15, 1952 promulgated a war risk insurance rate of 6½% for voyages from U. S. Pacific to Australian Ports and return. *Libelant's Exhibit* 54, Record, fols. 1967-1968; *Grotefend*, Record, fols. 794-795.

The effect of the "Held Covered" clause, the sections of the British Marine Insurance Act, 1906 which deal with deviation and change of voyage, and the authorities on that

subject, are discussed in *Arnould on Marine Insurance*, 13th Ed. Vol. 1, Sections 376-390.

We respectfully submit that this Court's holding "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (*Slip Opinion*, page 1185) is wholly incompatible with the express provisions of the "Held Covered" clause.

II.

THIS COURT'S HOLDING THAT, BY REASON OF THE *Portmar's* COMPLIANCE WITH MILITARY ORDERS, THERE WAS A "FRUSTRATION" OF THE VOYAGE CONTEMPLATED IN THE *Portmar's* CHARTER AND POLICY, IS DIRECTLY CONTRARY TO THE DOCUMENTARY FACTS.

a. The charter contemplated military interference during the term of the charter.

It may be granted that the policy on the *Portmar* "must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer. * * *" (*Slip Opinion*, p. 1184). But "the venture as the parties contemplated it" was not, as the Court seems to have assumed, merely the voyage described in Article 1.01 of the charter, "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports". *Charter*, Record, fol. 57.

This single provision must be read not only with due regard to the other provisions of the charter, but also to the historical facts and the known condition of tension in the relations between this country and Japan at the time the charter was made and the insurance was placed.

The contractual context and historical background show that the parties contemplated the possibilities of extensive changes from the voyage specifically described in Article

1.01. The charter itself is replete with provisions showing a clear contemplation of military interference with the vessel's employment.

In Article 2.04 it is provided that in the event of accident or damage to the vessel, hire should not cease because of "the happening of any event * * * caused or contributed to by war or warlike acts * * * * navigating (contrary to peacetime custom) under the direction of naval, military, Coast Guard, or other governmental authorities, * * *". *Charter*, Record, fols. 71-72.

Article 2.15 provides that all bills of lading issued under the charter should contain certain clauses including "*War Clauses*", in part as follows: (italics ours)

> "* * * The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, *routes, ports of call, stoppages, discharge, destination, delivery or otherwise* howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. *Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage.* The ship may carry contraband, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy." *Charter*, Record, fols. 99-100.

Article 2.16, the general exceptions clause, provides as follows:

> "* * * And neither the Vessel, her master or Owner nor the Charterer, shall, unless otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: * * * act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * No exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other

provisions of this Charter." *Charter*, Record, fols. 102-103.

Article 2.17 states:

> "The Owner may provide, and the Charterer shall pay for, * * *
>
> (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured * * *
>
> The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner * * *" *Charter*, Record, fols. 104-105.

Article 2.27 of the charter provides in part as follows: (italics ours)

> "ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, *and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation* or breach of orders or neglect of duty by the Master or the Vessel; * * *" *Charter*, Record, fol. 111.

Nothing could be clearer from the foregoing express provisions of the charter than that almost every conceivable contingency of military interference was expressly contemplated and provided for as being within the charter voyage.

Article 2.03 of the charter specifically required the charterer to "pay hire for the use of the vessel * * *

beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, * * * to the owner at the port of redelivery specified in Article 1.04 (a U. S. North Atlantic port), or if the Vessel shall be lost, until the time of her loss * * *; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, * * *".

Furthermore, the uncontroverted fact is that the United States Maritime Commission, as charterer, paid the charter hire to the libelant up to the time of the loss of the vessel at Port Darwin on February 19, 1942. *Groom*, Record, fols. 453-457.

The 123rd Finding of Fact by the Trial Court contained the following statement:

> "* * * Charter hire in full was paid the owner of the SS. *Portmar* pursuant to a charter party up to the time of the Japanese attack upon her February 19, 1942; * * *" *Record*, fol. 2224-2225.

The decision of this Court that the charter was frustrated ignores two important facts: (1) that the events which occurred were contemplated in the charter provisions; and (2) that the parties to the charter, by their actual conduct, showed that they regarded it as still in force up to the time of the loss of the vessel.

b. The risks of the prescribed voyage were not increased.

One further assumption in this Court's opinion also seems directly contrary to the facts of record. It is stated by the Court that "in the case at bar the requisition added *so notably to the risks of the prescribed voyage* that the voyage ceased to be the same." *Slip Opinion*, page 1184 (italics ours).

The very reason for the diversion of the *Portmar* from her prescribed voyage to the Philippine Islands was the outbreak of war between Japan and the United States on December 7, 1941. Under the actual conditions of Japanese control of the sea it was virtually certain that the vessel

would have become a toal loss if she had proceeded on the prescribed voyage.

Under those undeniable circumstances there is no factual basis for the Court's holding that the diversion of the vessel to Australia or the uses to which she was put in Australia were in any way more dangerous than the certainty of total loss if the vessel had continued on the "prescribed voyage".

Conclusion.

We therefore respectfully submit that the decision of this Court dated May 12, 1952 in Ad. 133-332 should be reconsidered in the light of the above facts and contentions, and that a rehearing for that purpose should be granted.

Dated May 23, 1952.

Respectfully submitted,

Kirlin, Campbell & Keating,
Proctors for Calmar Steamship
Corporation, Appellee.

Edwin S. Murphy,
Ira A. Campbell,
Helen C. Cunningham,
Counsel.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

Edwin S. Murphy

[fol. 826] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

against

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

Before L. Hand, Augustus N. Hand and Chase, Circuit Judges

Petition of Calmar Steamship Corporation for rehearing

Kirlin Campbell & Keating, Proctors for petitioner.

Per Curiam: Petition denied.

A. N. H., H. B. C.

Filed June 6, 1952.

[fol. 827] [Endorsed:] United States Court of Appeals, Second Circuit. Filed June 6, 1952. Alexander M. Bell, Clerk.

[fol. 828] UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 6th day of June, one thousand nine hundred and fifty-two.

Present: Hon. Learned Hand, Hon. Augustus N. Hand,
Hon. Harrie B. Chase, Circuit Judges

CALMAR STEAMSHIP CORPORATION, Libellant-Appellee,

v.

SYDNEY KEITH SCOTT, et al., Respondents-Appellants

A petition for a rehearing having been filed herein by counsel for the appellee,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

[fol. 829] [Endorsed:] United States Court of Appeals, Second Circuit. Calmar Steamship Corp. v. Sydney Keith Scott, et al. Order. United States Court of Appeals, Second Circuit. Filed June 6, 1952. Alexander M. Bell, Clerk.

[fol. 830] Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 262

CALMAR STEAMSHIP CORPORATION, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1952

No. 303

CALMAR STEAMSHIP CORPORATION, Petitioner,

vs.

SYDNEY KEITH SCOTT, One of the Lloyds Underwriters, et al.

ORDER ALLOWING CERTIORARI—Filed October 20, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

judgment of the United States Court of Appeals for the Second Circuit dated May 12, 1952 in the above entitled case.*

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet officially reported. It appears at pages 792-802 of the record. The endorsement and order dated June 6, 1952, denying the petition for rehearing filed May 23, 1952 will be found at pages 820-821 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

Statement of the Matter Involved

This is a suit by Calmar Steamship Corporation, a Delaware corporation, owner of the American cargo steamship *Portmar*, against British war risk underwriters of the vessel for recovery of a constructive total loss under the policies of war risk insurance by reason of damage sustained by the vessel in Japanese aerial attacks in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

The libel herein was filed on November 15, 1944 in the United States District Court for the Southern District of New York.

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* This petition for writ of certiorari, and a petition for a writ of certiorari in the case of *Calmar Steamship Corporation* v. *United States of America*, October Term, 1952, No. 262, are presented to this Court on a single printed record. Both cases arose out of the same disaster. The latter is to some extent alternative to the present case. These cases were not consolidated, but were tried together, and decided in a single opinion by the District Court. R. 700-756. It was directed by the District Court that the appeals proceed on a single printed record. R. 789. The appeals were decided in a single opinion by the United States Court of Appeals for the Second Circuit. R. 792-804.

The first cause of action claims recovery of the full insured value, $860,000, as for constructive total loss of the *Portmar,* and for additional sue and labor and salvage expenses, all with interest. The second cause of action claims in the alternative for a partial loss.

The Charter.

As of November 21, 1941, petitioner chartered the *Portmar* to the United States Maritime Commission by a time charter for one round voyage described in Article 1.01 of the charter as from "* * * from United States. Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports."

The charter contained, among others, the provisions set forth in Appendix I.

The War Risk Insurance.

On November 26 and 27, 1941, pursuant to Articles 1.03 and 2.17 of the time charter of the *Portmar,* petitioner obtained war risk insurance on the hull and machinery of SS. *Portmar,* valued at $860,000, on a voyage described in the policies as follows:

> "at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."
>
> Exhibits 6, 7 and 8; R. 70-71, 598.

The insurance was placed through petitioner's brokers, Mather & Co. of Philadelphia, and their London correspondents, Thos. Stephens & Sons, Ltd. R. 143-144.

Petitioner informed the United States Maritime Commission of the kind and amount of the war risk insurance, and said policies of insurance were approved by the United States Maritime Commission R. 715.

Three policies were issued, that of Lloyds' underwriters in the sum of $714,000; another by seven English companies, members of the Institute of London Underwriters, in the total sum of $116,000; and the third by Excess Insurance Company, Ltd. in the sum of $30,000. R. 710-711.

Said policies insured the *Portmar* against "the risks of war" and "all consequences of hostilities or warlike operations," and contained the "Free of British Capture (B. C. 2)" rider, providing, in effect, that although the underwriters would not be liable for any claim arising from restraint, detainment or requisition, the policy nevertheless, as long as the vessel remained the property of the assured (was not "condemned"), would cover losses caused by gunfire, bombs, or other implements of war. These provisions among others of the policies, are set forth in Appendix II.

The Agreement of February 6, 1942.

As shall hereafter appear, after the Japanese attack on Pearl Harbor, the *Portmar*, while on a voyage across the Pacific, was diverted under sovereign military orders, without petitioner's knowledge or consent, to the Fiji Islands and thence to Australia. The *Portmar* arrived at Sydney, Australia on December 30, 1941 and was ordered thence to Brisbane, Australia where she arrived on January 5, 1942. On January 19, 1942, petitioner was first informed unofficially that the *Portmar* was "somewhere in Australia."

On January 24, 1942 after petitioner had received word from its San Francisco office that the *Portmar* was in Australia, petitioner caused Mather & Co. of Philadelphia to

send a cable message to Thos. Stephens & Sons, Ltd., as follows:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> "MATHER CO."

Exhibit 4, R. 586.

That cable was received on January 26, 1942, was submitted by Messrs. Stephens to the underwriters and was initialed by each of them. R. 586.

On February 6, 1942 Thos. Stephens & Sons, Ltd. sent to Mather & Co. the following letter:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.
>
> "We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your further advices.

Exhibit 5, R. 593.

The forty-fifth finding of fact made by the District Court, contained, among others, the following findings, R. 720 (italics ours):

> "* * * On January 24, 1942, Calmar Steamship Corporation assuming that the *Portmar* had gone to Australia under government orders, notified the war risk underwriters that the *Portmar* had been diverted to Australia on outward voyage under Government orders and requested that the vessel be held covered pending further advices. *All the underwriters agreed,* and this was confirmed by letter from Thomas Stephens & Sons, Ltd., of February 6, 1942 to Mather & Company, reading: * * *" (quoting the above letter).

The foregoing agreement of February 6, 1942 was one of the grounds for the petition for rehearing, filed on May 23, 1952, and denied on June 6, 1952. R. 806-818, 820-821.

The Voyage.

Prior to sailing on the voyage the Master received from the United States Navy secret written and oral orders as to the positions to be passed on the voyage. R. 715.

Pursuant to Article 1.01 of the charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government under Article 2.01 of said charter.

On December 7, 1941 at about 8 A. M. when the *Portmar* was then about six hundred miles southeast* of the Hawaiian Islands following the route laid down in the naval orders, the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. R. 716.

The Master thereupon, for the safety of his vessel, turned to a southerly course to avoid the islands and possible capture by the Japanese until further naval orders were received. R. 717.

On December 11, 1941 the Master received orders by radio from the Commandant, Twelfth U. S. Naval District, San Francisco, to proceed to Suva, Fiji Islands and there to receive further instructions from the British naval authorities. The Master of the *Portmar* obeyed said orders and proceeded to Suva, Fiji Islands, arriving there on December 20, 1941. R. 717.

Every move of the *Portmar* from the time she was ordered to Suva, until she was damaged by enemy attack

* The word "southwest" in the decision of the Court of Appeals below, R. 793, is an error. See 25th Finding of Fact by the District Court. R. 716.

on February 19, 1942, was in accordance with sovereign military orders. R. 718.

At Suva the *Portmar* was ordered by the British Naval Control Officer, with the approval of the local United States Naval commander, to proceed to Sydney, Australia. After arrival at Sydney the *Portmar* was ordered by the Australian Naval Control, with the approval of local officers of the United States Army and Navy, to proceed to various Australian ports and deliver her outward cargo as ordered. The *Portmar* complied with those orders, arriving at said ports on the following dates: Sydney, December 30, 1941; Brisbane, January 5, 1942; Port Darwin, January 19, 1942; Wyndham, February 8, 1942; and back to Port Darwin, February 12, 1942. R. 717-721.

From the time the vessel sailed from San Francisco until January 19, 1942, when petitioner received unofficial information that the *Portmar* was "somewhere in Australia", petitioner did not receive any information and had no knowledge of the position or movements of the *Portmar*. R. 143, 720. The master of the *Portmar* repeatedly tried to notify petitioner of the movements of the vessel but military secrecy and controls prevented any communication. R. 281-282; 284-285; 286; 291-293.

On January 24, 1942, after receiving further information that the *Portmar* was in Australia, petitioner and the war risk underwriters entered into the special agreement shown by the cable message of petitioner's brokers to their London correspondents, dated January 24, 1942 and their reply dated February 6, 1942, quoted *ante* p. 5.

At Wyndham the *Portmar* discharged the last of her outward cargo and pursuant to orders theretofore received, returned without cargo to Port Darwin arriving there on February 12, 1942. R. 721.

Thereupon by orders of the officer commanding the United States Army forces at Darwin, the *Portmar* was directed to take on board a detachment of three to four hundred officers and men of the 148th U. S. Field Artillery with their field guns, military stores, supplies, equipment and ammunition and a motor launch belonging to the Australian Army; and on the night of February 14, 1942 in convoy conference on board the U. S. Cruiser *Houston*, in the presence of and with the approval of the commanding officer of the *Houston*, the Master of the *Portmar* and the Masters of three other merchant vessels received orders from the Australian Naval Control officer to proceed in convoy of the *Houston* and other naval vessels for the port of Koepang, Timor. R. 721-722.

Obeying these orders the *Portmar*, sailed in convoy of the *Houston* and other naval vessels from Port Darwin at 1:30 A. M. on February 15, 1942 carrying the artillery, troops and materiel to aid in the defense of Koepang. R. 722.

On the same day while steaming across Timor Sea, the convoy was attacked by two Japanes planes. The *Portmar* did not sustain any damage in that attack. R. 722.

On February 16, 1942, while still proceeding across Timor Sea, the convoy was attacked by a squadron of Japanese bombers. The *Portmar* sustained some damages in that attack but was nevertheless able to proceed. On orders of the Commander of the *Houston* the convoy returned to Port Darwin and anchored there at 12:55 P. M. on February 18, 1942. R. 723.

The Disaster.

On February 19, 1942 at about 9:55 A. M., Japanese aircraft attacked Port Darwin. Among other casualties SS. *Neptune*, the Destroyers USS. *Perry* and USS. *Preston*,

the United States Army Transport *Meigs*, SS. *Mauna Loa* and a British motor ship were destroyed. R. 309-310; 539-540; 724; 730-731. In that attack, the *Portmar* was riddled and shattered by bomb fragments and aerial gun fire. R. 309-320. The damages sustained by the *Portmar* were so extensive and serious that the Master beached the vessel in order to prevent her from sinking in the deep wafer of the harbor. R. 320; 724.

Notice of Abandonment.

Promptly after receipt of information of the extent of the loss, petitioner, on April 8, 1942, through its brokers, tendered to the war risk underwriters abandonment of its interest in the *Portmar*. On the same date, the tender of abandonment was rejected by the war risk underwriters. R. 587-589.

Underwriters' repudiation of liability.

On January 8, 1943 the war risk underwriters informed Thos. Stephens & Sons, Ltd., London that after careful consideration they declined all liability under the policies, on the ground "that all liability under their policies had terminated prior to the casualty." That repudiation was transmitted to petitioner by letter, initialed by all the respondent underwriters, from Thos. Stephens & Sons, Ltd., London to Mather & Company, Philadelphia, dated January 8, 1943. R. 590-591; 740-741.

The Decisions Below.

The District Court held that petitioner was entitled to recover from the underwriters the insured value of the *Portmar*, $860,000 with sue and labor expenses and the amount expended to satisfy a judgment for salvage award,

all with interest. The District Court held that the policies were in effect at the time of the loss; that the loss was covered by the policies and that the vessel became a constructive total loss within the meaning of the policies by reason of a peril insured against; that petitioner is not precluded from recovery under the policies; that petitioner's tender of abandonment to the war risk underwriters was sufficient. R. 744-756. Final decree was entered on July 20, 1951 in favor of petitioner in the total sum of $1,390,471.05. R. 765-768.

On appeal by respondents, R. 772-776, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and directed that the libel be dismissed, holding that the voyage ended when the *Portmar* arrived at Brisbane on January 5, 1942, by reason of frustration due to the military dominion and controls then existing under the emergency in Australia, and that the policies then ceased to cover the ship. R. 802.

JURISDICTION

The jurisdiction of this Court to review this case on a writ of certiorari is provided by Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED*

1. Whether war risk underwriters of a cargo vessel, who have issued in the face of impending war a policy covering, among other things, "the risks of war" and "all

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* If this petition is granted, petitioner reserves for submission to this Court the question raised but not decided below, whether underwriters are barred from raising any defense not specified in the repudiation letter of January 8, 1943, *Ohio & M. R. Co.* v. *McCarthy* (1877) 96 U. S. 258, 267-8, and the following questions on the merits which were decided in petitioner's favor by the Dis-

consequences of hostilities or warlike operations", are relieved of liability under said policy for damage to the vessel by enemy attack, solely because of frustration of the voyage by sovereign orders in a distant war area, of which the insured owner has not any knowledge, when the policy contains an express provision that notwithstanding such restraint, the insurance would cover damage by gunfire, bombs or other implements of war, and where the underwriters specially agreed, after the date on which the frustration is held to have occurred, and with knowledge that the vessel had been diverted by government orders into a zone of military control, to hold the vessel covered.

2. Whether the voyage specified in a time charter and in the policies of war risk insurance of a vessel is frustrated as a fact†, or is to be held frustrated as matter of law, by

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trict Court, and on which the Court of Appeals did not make any decision:

(a) Whether, despite any other event, the war risk insurance policies were in effect at the time of the loss on February 19, 1942.

(b) Whether the losses sustained by petitioner with respect to the *Portmar* were covered by the policies even in the absence of, but certainly in view of, the "Free of British Capture (B. C. 2)" rider.

(c) Whether the *Portmar* was a constructive total loss within the provisions of the war risk policies.

(d) Whether the tender of abandonment was sufficient.

Petitioner will contend that the decision of the District Court in petitioner's favor on questions (a), (b), (c) and (d) was right, and should be reinstated by this Court.

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† It is submitted that whether or not a frustration occurred on the uncontroverted facts of this record is a question of law which may be raised by petitioner for review by this Court. But if frustration of the voyage is to be deemed a question of fact, then in view of the observations of this Court in *Standard Oil Company of New Jersey*, v. *United States of America* (1950), 340 U. S. 54, at pages 56-57 and 58-59, petitioner seeks a review of such a question of fact because of divergence between the findings of the District Court, R. 746, 751, and the findings of the Court of Appeals, R. 793, 802.

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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BRIEF:

I. The Decision of the United States Court of Appeals for the Second Circuit herein is in direct conflict with the decision of the House of Lords in *Rickards* v. *Forestal Land etc., Co., Ltd.*, [1942] A. C. 50 15

II. The decision of the United States Court of Appeals for the Second Circuit herein affects an important question of Federal Law which has not been, but should be, settled by this Court 19

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Supreme Court of the United States

OCTOBER TERM, 1952, No.....

CALMAR STEAMSHIP CORPORATION,
Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Calmar Steamship Corporation, prays that a writ of certiorari be issued to review the decision and

constructive total loss because, for instance, there was no proper notice of abandonment, *still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the assured and was still covered by the policy.* * *"*

Lord Porter, at page 111;

"* * * From the time the master broke off from his contractual voyage to return to Germany, whether that be when he made up his mind to abandon the voyage (as Arnould seemed to think from his observations in s. 380), or whether it be when that purpose was manifested—to use the word found in the Marine Insurance Act, 1906, s. 45, sub-s. 2—or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods which henceforward remained in the control of the German government and in the grip of their restraint until they were lost by the master's action in scuttling his ship. For this purpose it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so. *But that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss while the goods were still covered by the policy.*"

In the present case it was held that the war risk insurance terminated on frustration of the voyage and did not cover a constructive total loss of the vessel by enemy attack which occurred thereafter.

The decision of the Court of Appeals herein and the decision of the House of Lords in the *Rickards* case can-

not be reconciled. The conflict is clearly defined and on the precedent of *Aetna Insurance Company* v. *United Fruit Company,* (1938) 304 U. S. 430, 434, a writ of certiorari should be issued for review of the decision of the United States Court of Appeals for the Second Circuit herein.

II.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN AFFECTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

Any decision which strikes at the root of the war risk insurance contract affects an important question of federal law within the maritime jurisdiction of the Courts of the United States. An important question of maritime law, not settled by this Court, was ground for issuance of a writ of certiorari in *Isbrandtsen Co.* v. *Johnson,* (1952) 342 U. S. 940, 343 U. S. 779.

The decision of the Court of Appeals below was that the policies came to an end because the specified voyage was frustrated by military dominion and control of the vessel on and after her arrival at Brisbane on January 5, 1942.

The exercise of government restraint by military orders was anticipated in both the time charter and in the war risk insurance policies.

Article 2.15 of the charter provided that delivery or other disposition of the goods in accordance with Government orders or military controls would be a fulfilment of the contract voyage, and Article 2.27 provided that under such circumstances anything done or not done would not be a deviation. Similar clauses were involved in the *Rickards*

case and were the basis for the decision that there was no "deviation" when the German ship masters turned their vessels away from their voyages pursuant to orders received from the German Government. [1942] A. C. 50, 73, 108.

The "War Risk Clauses" of the present policy contained among other provisions, the "Free of British Capture" (B. C. 2) rider which excludes any claim arising from, among other causes, restraint, detainment or requisition by the British or Allied Governments (which in this case included the United States), but no such claim is made here. That rider further provides, however, that notwithstanding any such restraint, detainment or requisition, unless the vessel be condemned (as she was not), losses caused by enemy attack remain covered. The "Free of British Capture" rider is as follows: (Italics ours)

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; *but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding,* sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Exhibits 6, 7 and 8, R. 70-71; R. 598.

Passing the question whether a frustration of the voyage occurred at all in view of the fact that the events held to cause a frustration of the voyage were anticipated and provided for in the charter, it is clear that the war risk insurance policies, issued on the eve of the outbreak of war, contemplated the very events which occurred and explicitly provided that notwithstanding restraint or detainment or requisition by the British Government or any of its allies, the policies would nevertheless cover damage to the insured vessel by enemy attack. The provisions of the "Free of British Capture" rider, above quoted, are clear and should be regarded, as held by the District Court, as preserving the insurance from the collapse which the Court of Appeals held to have occurred.

The Court of Appeals below has given to the war risk underwriters a gratuitous release from liability in holding that the policies ceased to cover the ship because the voyage was frustrated. In so holding, the Court stated that "We have found no decision under a marine policy which is certainly relevant" (R. 798) and thereupon cited charter frustration cases which did not involve any clauses like the modern war clauses of the present charter, and the "Free of British Capture" rider of the policies, as authority for its unprecedented conclusion. R. 798-800.

In view of Articles 2.15 and 2.27 of the charter the Court below erred in holding that the voyage was frustrated on January 5, 1942 when the vessel began to distribute her outward cargo of Government stores and munitions at various ports in Australia under the direction of United States military authorities.

Those articles of the charter expressly provided that anything done or not done under sovereign orders would

be a fulfilment of the contract voyage. But whether the voyage as specified in the charter or in the policies was frustrated or not, there is no basis for the conclusion that the war risk underwriters were released from liability under the war risk insurance policies, because the policies were not married to the charter, and contained an explicit provision in the Free of British Capture rider, quoted *ante*, p. 20, that notwithstanding governmental arrest, restraint or detainment, the policies would cover damage by enemy attack.

The "Held Covered" clause.

The present war risk insurance policies contain a "Held Covered" clause in the usual form, as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." F-300.
>
> Exhibits 6, 7 and 8, R. 70-71; R. 714.

Petitioner has not made any claim under the "Held Covered" clause, because it does not apply where the diversion is under compulsion of sovereign control. That clause was designed to cover a situation where the vessel *voluntarily* deviates from the voyage specified in the policies or where there is a *voluntary* change of voyage. It prevents the termination of the insurance protection even in case the vessel may without excuse depart from the limits of the voyage specifically described in the policy.

We have never contended that the present policies were continued in effect solely by virtue of the "Held Covered"

clause, because it does not apply to a situation, and is unnecessary, where the deviation or change of voyage is *involuntary* on the part of the assured. *Rickards* v. *Forestal etc. Co. Ltd.* [1942], A. C. 50, 82-83, 109-110. Compare Section 46 of the British Marine Insurance Act, 1906, with Section 49, (a) and (d) of the same Act.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect, even where deviation or change of voyage occurred with the consent of the assured, then *a fortiori* the insurance should be held to continue in effect if a deviation or change of voyage occurs *without the consent or control of the assured.*

The decision of the Court of Appeals herein "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802) is wholly incompatible with the express provisions of the "Held Covered" clause.

The Special Agreement of February 6, 1942.

The foregoing petition sets forth the documents constituting the special agreement of February 6, 1942 between petitioner and the war risk underwriters that the *Portmar*, then known to be in Australia under Government orders, would be held covered pending further advices, *ante*, p. 5.

It is beyond comprehension how it could be held that the war risk insurance policies collapsed by reason of frustration of the voyage on January 5, 1942, in the light of the uncontested fact that the underwriters explicitly agreed, a month later, on February 6, 1942, thirteen days before the disaster occurred, to hold the vessel covered, knowing that the *Portmar* was then in Australia under Government orders.

Nowhere in the decision of the Court of Appeals below is there any reference to the cable sent by petitioner's brokers to Messrs. Stephens of London on January 24, 1942, and the letter from Messrs. Stephens dated February 6, 1942, initialed by all the underwriters, confirming the underwriters agreement to hold the *Portmar* covered, although those documents are fully set forth in the record (R: 586, 593) and were mentioned in petitioner's brief as appellee in the Court below. Moreover, those documents were quoted in the petition for rehearing (R. 808-809) which was denied. R. 820-821.

The diversion of the vessel from the specified voyage, or frustration of the voyage, did not affect the insurance of the safety of the vessel under the war risk policies. It is settled that the insurance remains in effect, throughout and after diversion, if the departure from the proposed voyage is involuntary on the part of the assured.

Robinson & Robinson v. *Marine Ins. Co.* (1806), 2 Johns. (N. Y.) 89;

Post v. *Phoenix Ins. Co.* (1813), 10 Johns. (N. Y.) 79;

Graham v. *Commercial Ins. Co.* (1814), 11 Johns. (N. Y.) 352;

Burgess v. *Equitable Mar. Ins. Co.* (1878), 126 Mass. 70, 79;

Audendried v. *Mercantile Mut. Ins. Co.* (1875), 60 N. Y. 482;

Aktiebolaget etc. Bank v. *American M. M. Ins. Co.* (The Ada), (1925), 241 N. Y. 197;

Scott v. *Thompson* (1805), 1 Bos. & Pul (N. R.) 181; 127 E. R. 429;

Rickards v. *Forestal etc. Co.* [1942] A. C. 50, 82-83;

British Marine Insurance Act, 1906, Section 45-(1); Section 46-(1); Section 49-(b), (d) and (e).

These were the authorities cited and on which the District Court relied in holding that the policies remained in full effect at the time of the loss. R. 745-746.

In disregard of these authorities, all cited in petitioner's brief as appellee before the Court of Appeals herein, it was held by that Court that the war risk insurance policies came to an end because the voyage was "frustrated".

The Court of Appeals below has thus rendered a decision which overturns the structure of war risk insurance of a vessel, because the life of the policy is made to depend on the continuance of the "venture" without regard to whether the cause of frustration is beyond the control, and without the consent, of the assured.

So preposterous a conclusion should not be allowed to stand, especially where the war risk policies, under the terms of the Free of British Capture rider, expressly contemplate and provide for insurance of the vessel against losses caused by enemy attack notwithstanding the sovereign restraint or control.

The questions here involved are not merely academic, nor related only to the terminated hostilities of World War II. What occurred in this case may readily occur again, because it is now familiar to all that one of the first events on the outbreak of hostilities is the exercise of governmental control over all vessels of the flag, wherever located. It is vital to shipowners and underwriters alike that the decision of the Court of Appeals herein be

reviewed and that the nature and extent of the cover of war risk insurance under such circumstances be determined by this Court.

Conclusion

THE QUESTIONS STATED IN THE PETITION SHOULD BE SETTLED BY THIS COURT.

A writ of certiorari should be issued in accordance with the prayer of the foregoing petition.

Dated New York, August 27, 1952.

Respectfully submitted,

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IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
Of Counsel.

APPENDIX I.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

* * *

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's dead-

reason of governmental orders to, or military restraint of, the vessel, where the time charter contains provisions anticipating such orders and restraint and providing that in such event anything done or not done shall not be deemed a deviation, and where the war risk insurance policies contain a provision that notwithstanding such event, damage to the vessel by enemy attack shall remain covered.

Reasons for Allowance of Writ of Certiorari

1. The decision herein of the United States Court of Appeals for the Second Circuit is in direct conflict with the decision of the English House of Lords in *Rickards* v. *Forestal Land etc. Co. Ltd.* (and two other cases decided in the same judgment) [1942] A. C. 50, 88, 110-116.

This Court has held that the decision of American courts in cases of marine insurance should accord respect to English maritime laws. *Queen Ins. Co. of America* v. *Globe & Rutgers Fire Ins. Co. (The Napoli)* (1924), 263 U. S. 487, 493; *Standard Oil Company of New Jersey* v. *United States of America* (1950), 340 U. S. 54, 59.

Conflict with an English decision (even of a lower court) was the basis for issuance of a writ of certiorari in *Aetna Ins. Co.* v. *United Fruit Company* (1938), 304 U. S. 430, 434.

2. The decision of the United States Court of Appeals for the Second Circuit herein affects an important question of federal law which has not been, but should be, settled by this Court. The decision below destroys the structure and cover of war risk insurance of vessels. If a policy of war risk insurance is terminated, and the insured shipowner deprived of recovery for damage sustained by the insured vessel in an enemy attack, solely because of frustration of the specified voyage by a prior military restraint and con-

trol of the vessel, even though contemplated and provided for not only in the charter of the insured vessel but also in the war risk policy, and without the knowledge or consent of the assured, then war risk insurance loses all purpose and value, and is reduced to what MacKinnon, L. J. of the Court of Appeal in *Rickards* v. *Forestal Land etc. Co.* [1941], 1 K. B. 225, 250, described as a "fatuous and worthless contract" and which, on appeal to the House of Lords, the Lord Chancellor called "perfectly useless." [1942] A. C. 50, 65.

The disastrous effect of the decision of the Court of Appeals below in the present case on policies of war risk insurance calls for consideration and review by this Court.

WHEREFORE, petitioner respectfully prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit.

Dated New York, August 27, 1952.

CALMAR STEAMSHIP CORPORATION,

By EDWIN S. MURPHY,
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IRA A. CAMPBELL,
HELEN C. CUNNINGHAM,
of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HEREIN IS IN DIRECT CONFLICT WITH THE DECISION OF THE HOUSE OF LORDS IN RICKARDS v. FORESTAL LAND ETC., CO., LTD., [1942] A. C. 50.

In the *Rickards* case, British goods on German ships at the outbreak of World War II, were carried off when the German shipmasters obeyed orders of the German Government to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes, or, as a last resort, to scuttle their vessels. The goods were covered by Lloyds policies insuring against both marine and war risks. The three vessels turned away for neutral ports, and thence, with their cargoes on board, attempted to run the Allied naval blockade and get back to Germany. Two were scuttled when overhauled by Allied cruisers. The third got through to Hamburg.

There is a close parallel between the facts of the *Rickards* case and those of the present case.

In the present case as in the *Rickards* case the policies contained a warranty excluding any claim for loss by frustration of the voyage. Appendix II, page vi.* Petitioner's case does not depend on frustration of the voyage, but rests

* The warranty excluding claims for loss of or frustration of the insured voyage was adopted in 1919 to avoid the liability imposed on underwriters in *Sanday & Co.* v. *British and Foreign Marine Ins. Co.* [1916] A. C. 650. But it was held in the *Rickards* case that the insurance is not only *of the voyage*, but *of the goods* as well; and that frustration of the voyage did not terminate the insurance of the safety of the goods where the deviation was without consent of the assured. See British Marine Insurance Act, 1906, Sections 46 and 49.

on the physical damage sustained by the *Portmar*, by reason of enemy attack, and consequential expenses.

In both cases the insured property was damaged or lost by enemy action; in the present case by enemy aerial attack, in the *Rickards* case by acts of the German ships' masters who became enemies of the British cargo owners upon the declaration of war in September, 1939.

In both cases the insured property was restrained by sovereign control without the knowledge or consent of the assured. In both cases it was held that the voyage was frustrated by sovereign restraint.

With the facts thus similar the decision of the Court of Appeals below is to the same effect as the decision of the trial court in the *Rickards* case, which was reversed on appeal, and is in direct conflict with the decisions of the Court of Appeal and the House of Lords which reversed the decision of the trial court in the *Rickards* case.

The opinions of the House of Lords in the *Rickards* case held that while constructive total loss of the goods may have occurred when the German masters of the three ships left their voyages to proceed to neutral ports, or may have occurred later when they sailed from neutral ports to run the Allied naval blockade in their attempt to reach German ports, pursuant to the orders of the German government, the goods certainly became an actual total loss thereafter by scuttling of two of the ships when overhauled by cruisers of the Allies, and by escape of the third to Hamburg; that whether the loss be deemed to have occurred on deviation to neutral ports, or on leaving neutral ports to run the blockade, or on scuttling or arrival in a German port as the event occurred, *the policies remained in effect and covered the actual total loss of the goods.* See [1942] A. C. 50, 88, 111.

In the Court of Appeal, in dealing with the underwriters' contentions and the decision of the trial judge, Mackinnon, L. J. said, [1941] 1 K. B. 225 at page 250:

> "I think it is unnecesssary to discuss further this misconception as to the nature of a policy on goods. I would only add that, if Hilbery J.'s view were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, on the judge's reasoning, would in every case of such deprivation that I can imagine make that promise absolutely nugatory!"

The following quotations from the opinions in *Rickards v. Forestal Land etc., Co. Ltd.*, [1942], A. C. 50, show that the war risk insurance of the goods did not terminate when the voyages were frustrated, but remained in effect and covered the actual total loss of the goods: -(Italics ours)

Lord Wright, at page 88;

> "• • • Mr. Miller strenuously contended that, if there was a constructive total loss, which did not give the assured a claim because it was one for which, in virtue of the frustration clause, the underwriter was not liable, all possible claims under the policy were excluded, even though in the end the goods were totally lost by an insured peril. This argument found favour with the trial judge. *It led MacKinnon L. J. to some severe strictures on the futility of such an insurance or pretended insurance against war risks and on its utterly unbusinesslike character. I agree with these strictures.* But with all respect to the learned judge, the arguments are based on a misconception, quite apart from the effect of the frustration clause. If the sailing from Rio under the orders of the German government did not give a claim to a

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303.

GALMAR STEAMSHIP CORPORATION,

Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

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weight capacity as hereinbefore stated per month or pro rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. • • •

• • •

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

• • •

PART II.

• • •

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss, • • •

ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or • • •

Provided, however, That, except to the extent that loss of time is caused by the failure of the Owner to exercise

due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

• • •

(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, or other governmental authorities, or discharging alongside or into ships; or • • •

• • •

• • • Credit shall be given to the Charterer for expenses save by the Owner during any loss of time as to which no cessation of hire is provided for.

• • • •

ARTICLE 2.15.

• • •

(v) *War Clauses*

• • • •

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. The ship may carry contra-

band, explosives, munitions, warlike stores, hazardous cargo, and may sail armed or unarmed and with or without convoy."

• • •

ARTICLE 2.17. The Owner may provide, and the Charterer shall pay for, or, if the Charterer shall so elect and give notice of such election to the Owner at or prior to the date of delivery of the Vessel with respect to the first voyage, or at or prior to the time when loading commences at the first port of loading with respect to any subsequent voyage during the charter period, the Charterer shall provide and pay for or assume: (i) insurance on the Vessel, which shall be made payable to the Owner, in the amount specified in Article 1.03, under full form of American Institute of Marine Underwriters' war risk policies, including malicious damage, sabotage, strikes, riots and civil commotion, valued at the amount insured • • •

The Vessel shall not be required to sail on any voyage until the insurance contemplated by this Article has been placed by the Owner or provided or assumed by the Charterer, as the case may be, provided, however, that written or telegraphic notice of assumption by the Charterer shall be sufficient.

• • •

ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; • • •

APPENDIX II.

Pertinent Clauses of the war risk insurance policies, SS. Portmar, Schedule A, Attached to Libel, R. 70-71.

"at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."

* * *

"Only against the risks of war, strikes, riots and civil commotions as per American Form attached."

* * *

"F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

* * *

WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. war-

ranty contained therein but which are excluded by that warranty."

* * *

"Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71, 598, 711-715.

The libel herein was filed on November 15, 1944 in the United States District Court for the Southern District of New York.

The first cause of action claims recovery of the full insured value, $860,000, as for constructive total loss of the *Portmar*, and for additional sue and labor and salvage expenses, all with interest. The second cause of action claims in the alternative for a partial loss.

The War Risk Insurance.

On November 26 and 27, 1941, pursuant to Articles 1.03 and 2.17 of the time charter of the *Portmar*, petitioner obtained war risk insurance on the hull and machinery of SS. *Portmar*, valued at $860,000, on a voyage described in the policies as follows:

> "at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return. to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."
>
> Exhibits 6, 7 and 8; R. 70-71, 598.

The insurance was placed through petitioner's brokers, Mather & Co. of Philadelphia, and their London correspondents, Thos. Stephens & Sons, Ltd. R. 143-144.

Petitioner informed the United States Maritime Commission of the kind and amount of the war risk insurance, and said policies of insurance were approved by the United States Maritime Commission R. 715.

Three policies were issued, that of Lloyds' underwriters in the sum of $714,000; another by seven English companies, members of the Institute of London Underwriters, in the total sum of $116,000; and the third by Excess Insurance Company, Ltd. in the sum of $30,000. R. 710-711.

Said policies insured the *Portmar* against "the risks of war", "all consequences of hostilities or warlike operations", "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations", and contained among others, a Held Covered clause, and the "Free of British Capture (B. C. 2)" rider providing, in effect, that although the underwriters would not be liable for any claim arising from restraint, detainment or requisition, the policy nevertheless, as long as the vessel remained the property of the assured (i.e., was not "condemned"), would cover losses caused by gunfire, bombs, or other implements of war. These provisions among others of the policies, are set forth in Appendix I.

The Charter.

At the time the war risk insurance was written, the *Portmar* was under time charter by petitioner to the United States Maritime Commission for one round voyage described in Article 1.01 of the charter as from "* * * from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports." *Charter,* R. 18-38.

The charter contained, among others, the provisions set forth in Appendix II.

The Special "Held Covered" Agreement of February 6, 1942.

As shall hereafter appear, after the Japanese attack on Pearl Harbor, the *Portmar,* while on a voyage across the Pacific, was diverted under sovereign military orders, without petitioner's knowledge or consent, to the Fiji Islands and thence to Australia. The *Portmar* arrived at Sydney, Australia on December 30, 1941 and was ordered thence to Brisbane, Australia where she arrived on January 5, 1942.

On January 19, 1942, petitioner was first informed unofficially that the *Portmar* was "somewhere in Australia."

On January 24, 1942 after petitioner had received word from its San Francisco office that the *Portmar* was in Australia, petitioner caused Mather & Co. of Philadelphia to send a cable message to Thos. Stephens & Sons, Ltd., as follows:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO"

Exhibit 4, R. 586, 720.

That cable was received on January 26, 1942, was submitted by Messrs. Stephens to the underwriters and was initialed by each of them. R. 586.

On February 6, 1942 Thos. Stephens & Sons, Ltd. sent to Mather & Co. the following letter:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been diverted to Australia on the outward voyage under Government orders.
>
> "We confirm that all Underwriters on our War Risk Policy have agreed to hold this diversion covered pending your fufther advices."

Exhibit 5, R. 593, 720.

The Voyage.

Prior to sailing on the voyage the Master received from the United States Navy secret written and oral orders as to the positions to be passed on the voyage. R. 715.

Pursuant to Article 1.01 of the charter, the *Portmar* sailed on November 28, 1941 from San Francisco for the

Philippine Islands, with cargo of high octane gasoline in drums, military equipment and supplies shipped by the Government under Article 2.01 of said charter.

On December 7, 1941 at about 8 A. M. when the *Portmar* was then about six hundred miles southeast* of the Hawaiian Islands following the route laid down in the naval orders, the Master of the *Portmar* heard a radio report of the Japanese attack on Pearl Harbor. R. 716.

The Master thereupon, for the safety of his vessel, turned to a southerly course to avoid the islands and possible capture by the Japanese until further naval orders were received. R. 717.

On December 11, 1941 the Master received orders by radio from the Commandant, Twelfth U. S. Naval District, San Francisco, to proceed to Suva, Fiji Islands and there to receive further instructions from the British naval authorities. The Master of the *Portmar* obeyed said orders and proceeded to Suva, Fiji Islands, arriving there on December 20, 1941. R. 717.

Every move of the *Portmar* from the time she was ordered to Suva, until she was damaged by enemy attack on February 19, 1942, was in accordance with sovereign military orders. R. 718.

At Suva the *Portmar* was ordered by the British Naval Control Officer, with the approval of the local United States Naval commander, to proceed to Sydney, Australia. After arrival at Sydney the *Portmar* was ordered by the Australian Naval Control, with the approval of local officers of the United States Army and Navy, to proceed to various Australian ports and deliver her outward cargo as ordered. The *Portmar* complied with those orders, arriving

* The word "southwest" in the decision of the Court of Appeals below, R. 793, is an error. See 25th Finding of Fact by the District Court. R. 716.

at said ports on the following dates: Sydney, December 30, 1941; Brisbane, January 5, 1942; Port Darwin, January 19, 1942; Wyndham, February 8, 1942; and back to Port Darwin, February 12, 1942. R. 717-721.

From the time the vessel sailed from San Francisco until January 19, 1942, when petitioner received unofficial information that the *Portmar* was "somewhere in Australia", petitioner did not receive any information and had no knowledge of the position or movements of the *Portmar* except that on or about January 17, 1942 petitioner was informed that the U. S. Maritime Commission had arranged the return voyage of the *Portmar* from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720. The master of the *Portmar* repeatedly tried to notify petitioner of the movements of the vessel but military secrecy and controls prevented any communication. R. 281-282; 284-285; 286; 291-293.

On January 24, 1942, after receiving further information that the *Portmar* was in Australia, petitioner and the war risk underwriters entered into the special "Held Covered" agreement shown by the cable message of petitioner's brokers to their London correspondents, dated January 24, 1942 and their reply dated February 6, 1942, quoted *ante*, page 6.

Thus the war risk insurance involved here consisted of the original policies and the special "Held Covered" agreement of February 6, 1942.

At Wyndham the *Portmar* discharged the last of her outward cargo and pursuant to orders theretofore received, returned without cargo to Port Darwin arriving there on February 12, 1942. R. 721.

Thereupon by orders of the officer commanding the United States Army forces at Darwin, the *Portmar* was

directed to discharge all dunnage and take on board a detachment of three to four hundred officers and men of the 148th U. S. Field Artillery with their field guns, military stores, supplies, equipment and ammunition and a motor launch belonging to the Australian Army; and on the night of February 14, 1942 in convoy conference on board the U. S. Cruiser *Houston*, in the presence of and with the approval of the commanding officer of the *Houston*, the master of the *Portmar* and the Masters of three other merchant vessels received orders from the Australian Naval Control officer to proceed in convoy of the *Houston* and other naval vessels for the port of Koepang, Timor. R. 721-722.

Obeying these orders the *Portmar*, sailed in convoy of the *Houston* and other naval vessels from Port Darwin at 1:30 A. M. on February 15, 1942 carrying the artillery, troops and materiel to aid in the defense of Koepang. R. 722.

On the same day while steaming across Timor Sea, the convoy was attacked by two Japanese planes. The *Portmar* did not sustain any damage in that attack. R. 722.

On February 16, 1942, while still proceeding across Timor Sea, the convoy was attacked by a squadron of Japanese bombers. The *Portmar* sustained some damages in that attack but was nevertheless able to proceed. On orders of the Commander of the *Houston* the convoy returned to Port Darwin and anchored there at 12.55 P. M. on February 18, 1942. The *Portmar* then received orders to await her turn at a specified discharging berth, and upon reaching her turn, to dock and discharge her military supplies, equipment and personnel. R. 723. At the time of the enemy attack which occurred on the following day there were no other military orders as to her future movements. Her

return voyage had been arranged by the U. S. Maritime Commission for a cargo of chrome ore from New Caledonia for Philadelphia. R. 142-143; 796-797.

The Disaster.

On February 19, 1942 at about 9:55 A. M., Japanese aircraft attacked Port Darwin. In that attack, the *Portmar* was riddled and shattered by bomb fragments and aerial gun fire. R. 309-320. The damages sustained by the *Portmar* were so extensive and serious that the Master beached the vessel in order to prevent her from sinking in the deep water of the harbor. R. 320; 724.

Constructive Total Loss.

As the *Portmar* lay beached in the upper harbor of Port Darwin on February 19, 1942 she was a constructive total loss. The United States Naval observer at Melbourne reported to the War Shipping Administration that he did not believe the *Portmar* could be salvaged as a cargo carrier but might be as a hulk or floating store. R. 606.

The Japanese dominated the sea and the air. There were no salvage or repair facilities whatever at Port Darwin. No private shipowner or commercial salvor could have obtained the necessary pumps or other salvage equipment. R. 350, 355-357, 496, 506-507, 730. The District Court found that petitioner "could not have arranged to retrieve and restore her to pre-disaster condition". R. 735.

The nearest port at which any repairs, however temporary, could have been attempted was Brisbane, two thousand miles away. The nearest drydock large enough to accommodate the *Portmar* was at Sydney, twenty-five hundred miles away. R. 355-356, 358, 730, 732-733. No private or commercial arrangement could have been made for the

towage of the *Portmar* to Brisbane or Sydney, or for repairs at such ports. R. 736-737.

The United States Navy had abandoned Port Darwin and moved to the Exmouth Gulf, fifteen hundred miles to the southwest. The Cape York Peninsula was evacuated except for a small detachment of about fifty American soldiers. A defense line had been set up fifteen miles north of Melbourne on the south coast. The Japanese held the Tanimbar Islands, only 300 miles away. R. 731-732. The *Portmar* was in imminent peril of actual total loss by Japanese invasion of northern Australia and such an invasion was expected at any moment. R. 730.

In the judgment of the Master and Chief Officer after the vessel was beached, salvage, repairs and restoration to her former condition was impossible, and if in any way it could be accomplished, the cost would have been out of all reason, far in excess of the value of the vessel. R. 350, 355-357, 496, 506-507, 730.

She was still a constructive total loss on April 8, 1942, even though, unknown to petitioner or the master (R. 733), by that date she had been floated by the military authorities and lay at anchor in the harbor. She was kept afloat only by salvage pumps. Except for some temporary patches the damages were unrepaired. R. 732-735.

Notice of Abandonment.

Promptly after receipt of information of the extent of the loss, petitioner on April 8, 1942, through its brokers, tendered to the war risk underwriters abandonment of its interest in the *Portmar*. On the same date, the tender of abandonment was rejected by the war risk underwriters. R. 587-589.

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Supreme Court of the United States

OCTOBER TERM, 1952, No. 303.

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

SYDNEY KEITH SCOTT, one of the Lloyds underwriters,

and

EDINBURGH ASSURANCE CO. LTD., NORTHERN MARITIME INSURANCE CO. LTD., FINE ART & GENERAL INSURANCE CO. LTD., BRITISH LAW AND INSURANCE CO. LTD., PLANET ASSURANCE CO. LTD., ELDERS INSURANCE CO. LTD. and NATIONAL PROVINCIAL INSURANCE CO. LTD., Insurance Companies Members of the Institute of London Underwriters,

and

EXCESS INSURANCE COMPANY LIMITED, of London, a British corporation,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONER'S BRIEF.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported in 197 F. 2d 795 and appears at pages 792-802 of the record. The endorsement and order

denying the petition for rehearing will be found at pages 820-821 of the record.

The decision of the United States District Court for the Southern District of New York is reported in 103 F. Supp. 243, and appears at pages 700-756 of the record.

JURISDICTION OF THIS COURT

This Court issued writ of certiorari on October 20, 1952.

The jurisdiction of this Court rests upon the provisions of Title 28, United States Code, Section 1254.

QUESTIONS PRESENTED*

1. Whether war risk underwriters of a cargo vessel, who have issued in the face of impending war a policy covering, among other things, "the risks of war" and "all consequences of hostilities or warlike operations", are relieved of liability under said policy for damage to the vessel by enemy attack, solely because of frustration of the voyage by sovereign orders in a distant war area, of which the insured owner has not any knowledge, when the policy contains an express provision that notwithstanding such restraint, the insurance would cover damage by gunfire, bombs or other implements of war, and where the underwriters specially agreed, after the date on which the frustration is held to have occurred, and with knowledge that

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* In the petition for writ of certiorari herein, petitioner reserved for submission to this Court the following questions on the merits which were decided in petitioner's favor by the District Court, and on which the Court of Appeals did not make any decision:

(a) Whether, despite any other event, the war risk insurance policies were in effect at the time of the loss on February 19, 1942.

(b) Whether the losses sustained by petitioner with respect to the *Portmar* were covered by the policies even in the absence of, but certainly in view of, the "Free of British

the vessel had been diverted by government orders into a zone of military control, to hold the vessel covered.

2. Whether the voyage specified in a time charter and in the policies of war risk insurance of a vessel is frustrated as a fact, or is to be held frustrated as matter of law, by reason of governmental orders to, or military restraint of, the vessel, where the time charter contains provisions anticipating such orders and restraint and providing that in such event anything done or not done shall not be deemed a deviation, and where the war risk insurance policies contain a provision that notwithstanding such event, damage to the vessel by enemy attack shall remain covered.

Statement of the Case

This is a suit by Calmar Steamship Corporation, a Delaware corporation, owner of the American cargo steamship *Portmar*, against British war risk underwriters of the vessel for recovery under the policies of war risk insurance of the *Portmar* by reason of damage sustained by the vessel in Japanese aerial attacks in the Timor Sea on February 16, 1942, and at Port Darwin, Australia on February 19, 1942.

(c) Whether the *Portmar* was a constructive total loss within the provisions of the war risk policies.

(d) Whether petitioner's tender of abandonment was sufficient.

Petitioner also reserved the question raised but not decided below, whether underwriters are barred from raising any defense other than that specified in the repudiation letter of January 8, 1943 (R. 590-591), by the decision of this Court in *Ohio & M. R. Co.* v. *McCarthy* (1877), 96 U. S. 258, 267-8.

Questions (a) and (b) are discussed in the First Point hereof.

Question (c) is discussed in the Third Point hereof.

Question (d), and other defenses waived by the underwriters (*Ohio & M. R. Co.* v. *McCarthy, supra*), are discussed in the Fourth

Salvage.

The *Portmar* was floated on April 5, 1942 on orders of the American military authorities, with the cooperation of the Australian government, by means of pumps sent overland 2,000 miles from southern Australia. R. 732-735.

The Battle of the Coral Sea occurred May 4-9, 1942. That naval victory relieved to some extent the eastern coast of Australia and made possible a military attempt with men chosen for a dangerous mission, to tow the *Portmar* from Port Darwin to Brisbane. R. 197, 736. There was no possibility of obtaining any naval escort in the waters still dominated by the Japanese west of the Torres Strait.

The tow began from Port Darwin on about June 25, 1942, and made a long detour around Melville Island and through the Gulf of Carpentaria, following the shore line, running only by night and hiding in coves by day. Until they rounded Cape York and got down off the Queensland Coast, they made their way in darkness through waters completely dominated by the Japanese. R. 736.

The tow arrived at Brisbane on or about July 29, 1942. R. 385. The Army had, and retained, complete possession and control of the vessel. R. 737. Thereafter the Army authorities at Brisbane accomplished certain preliminary cleaning of the *Portmar* and certain makeshift and patch-work repairs. R. 208-209, 738.

The Requisition of Title by the United States.

On November 17, 1942, at 12 noon, Eastern Australian time, the United States, acting by and through the War Shipping Administration, requisitioned title to SS. *Portmar* at Brisbane, Queensland, Australia. R. 738.

After said requisition and after the patch-work repairs performed by the Army had been completed, the vessel

moved to Sydney where she was placed on drydock. Some additional repairs were made there. R. 738.

The *Portmar* was never restored to her condition and insurance classification before the loss. R. 195-196, 738.

Thereafter, the *Portmar* made two or three trips for the United States Army and then was sunk by a Japanese torpedo. R. 739.

Underwriters' repudiation of liability.

On January 8, 1943 the war risk underwriters informed Thos. Stephens & Sons, Ltd., London that after careful consideration they declined all liability under the policies, on the ground "that all liability under their policies had terminated prior to the casualty." That repudiation was transmitted to petitioner by letter, initialed by all the respondent underwriters, from Thos. Stephens & Sons, Ltd., London to Mather & Company, Philadelphia, dated January 8, 1943. R. 590-591; 740-741.

Historical Facts.

Petitioner requests that this Court take judicial notice of the historical facts set forth in Appendix III.

The Decisions Below.

The District Court held that petitioner was entitled to recover from the underwriters the insured value of the *Portmar*, $860,000 with sue and labor expenses and the amount expended to satisfy a judgment for salvage award, all with interest. The District Court held that the policies were in effect at the time of the loss; that the loss was covered by the policies and that the vessel became a constructive total loss within the meaning of the policies by reason of a peril insured against; that petitioner is not precluded from recovery under the policies; that petitioner's tender

of abandonment to the war risk underwriters was sufficient. R. 744-756. Final decree was entered on July 20, 1951 in favor of petitioner in the total sum of $1,390,471.05. R. 765-768.

On appeal by respondents, R. 772-776, the United States Court of Appeals for the Second Circuit reversed the decision of the District Court and directed that the libel be dismissed, holding that the voyage ended when the *Portmar* arrived at Brisbane on January 5, 1942, by reason of frustration due to the military dominion and controls then existing under the emergency in Australia, and that the policies then ceased to cover the ship. R. 802.

The Court of Appeals completely ignored the special "Held Covered" agreement of February 6, 1942.

Petitioner filed a petition for rehearing based on the special "Held Covered" agreement of February 6, 1942, *ante*, page 6, and the "Held Covered" clause of the policies, quoted *post*, pp. 26-27. R. 806-818. The petition was denied. R. 820-821.

Specification of Errors

The United States Court of Appeals erred—

1. In holding that the war risk insurance of the *Portmar* terminated before the loss, even though a frustration of the round voyage of the *Portmar* occurred.

2. In failing to enforce the declared intent of the parties as shown by the specific provisions of the war risk insurance policies.

3. In granting to the war risk underwriters a release from liability by implication of an intent not to cover the loss which occurred.

4. In failing to apply the principles stated by the House of Lords in *Rickards* v. *Forestal Land etc. Co., Ltd.* [1942] A. C. 50 despite the admonition of this Court in *Queens Ins. Co. of America* v. *Globe & Rutgers Ins. Co.* (*The Napoli*), (1924) 263 U. S. 487 and recently in *Standard Oil Company of New Jersey* v. *United States of America* (*The John Worthington*), (1950) 340 U. S. 54.

5. In failing to give any effect to the special "Held Covered" agreement to hold the *Portmar* covered entered into between the petitioner and the war risk underwriters, on February 6, 1942.

6. In holding that the round voyage of the *Portmar* was frustrated before the loss occurred on February 19, 1942.

Summary of Argument

1. *The war risk insurance policies continued in effect and covered the loss.*

The war risk insurance of the *Portmar* was against "the risks of war" and "all consequences of hostilities or warlike operations" and "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations".

The policies contained a frustration clause quoted *post*, pp. 21-22, which contemplated that the voyage might be frustrated but did not contain any provision that the policies would come to an end in such event.

The policies contained a "Free of British Capture B. C. 2" rider quoted *post*, page 22 which specifically provided insurance for damage and consequent losses by reason of enemy attack, even though, at the time of the loss the vessel was under restraint, detainment or requisition.

In addition, there was a special agreement between the assured and the underwriters on February 6, 1942 that the *Portmar* would be held covered, after it was known, and the underwriters were informed, that the *Portmar* had been diverted to Australia on outward voyage under Government orders. *Ante*, p. 6.

On a claim in contract, and especially on an insurance contract, the declared intent of the parties controls. The policies contained clauses explicitly covering the loss. See the B. C. 2 rider, quoted *post*, p. 22, and the "Held Covered" clause quoted *post*, pp. 26-27.

If a vessel is forced to depart from the specific voyage described in a policy, or if the voyage be changed, without consent of her owner and master, not to mention that such events occur without even the knowledge of the assured, the underwriters are not discharged. See cases cited *post*, pp. 38-39.

The decision of the Court of Appeals below is in direct conflict with the decision of the House of Lords in *Rickards* v. *Forestal etc. Co., Ltd.*, [1942] A. C. 50, where the underwriters were held liable for loss of the goods notwithstanding that the voyage had already been frustrated, and that the vessels were changed into enemy blockade runners.

The risks of the voyage to the Philippines as prescribed by the policies were not increased by the diversion to Australia after the Japanese attack on Pearl Harbor, or by any of the events which occurred in Australia prior to the loss.

2. *The round voyage was not frustrated before the loss occurred.*

The voyage of the *Portmar* was not frustrated because the provisions of the charter under which the *Portmar* was engaged on the round voyage, explicitly anticipated and provided for the effect of any deviation or restraint by rea-

son of Government or military controls. See Articles 2.04, 2.15 and 2.27, Appendix II.

None of the decisions cited by the Court of Appeals in charter frustration cases, apply to the present case because they did not involve contract provisions such as are found here.

The parties to the charter, viz., petitioner and the United States Maritime Commission, treated the voyage and the charter as continuing in effect until information was received as to the extent of the disaster.

The test, as stated by the Court of Appeals below, R. 800, is the position at the time of the alleged frustration. On January 5, 1942 and thereafter until the loss on February 19, 1942 there were not any orders with respect to the *Portmar* which indicated that the vessel would not be allowed to complete her round voyage within a reasonable time. The question of frustration should not be determined by hindsight or subsequent events.

3. *The damages sustained by the vessel constituted a constructive total loss.*

The damages inflicted by the enemy attacks on the *Portmar* in the Timor Sea on February 16, 1942 and at Port Darwin on February 19, 1942 made her a constructive total loss, and she so remained on April 8, 1942 when petitioner tendered abandonment to the underwriters. Because of the domination of the sea by the Japanese Navy and of the air by the Japanese Air Force, the *Portmar* was in imminent peril of actual total loss. R. 731-732; 735-736. Further, it was impossible for the petitioner or any commercial salvor to have raised and recovered the vessel and towed her to Brisbane, two thousand miles away, the nearest port where any repairs, however temporary, could be

undertaken. There was not any salvage equipment at Port Darwin. Any salvage or towage or repairs could be accomplished only through the power of the Australian and American military authorities. Imminent peril of actual total loss, and impossibility of recovery and repair are recognized grounds for abandonment as for a constructive total loss. See authorities cited *post*, pp. 54-57.

In addition, the *Portmar* was a constructive total loss after the attack on February 19, 1942 and on April 8, 1942, because of the high probability that the cost of recovering and repairing the *Portmar* would exceed the insured value.

4. *Added defenses of the underwriters should be overruled.*

The underwriters have put forward defenses to the effect that petitioner is precluded from recovery *even though the policies were in effect at the time of the loss*, because—

(a) the *Portmar* was converted to a troop-ship on an independent voyage;

(b) the *Portmar* was deliberately exposed to risk of loss;

(c) the tender of abandonment was defective in that the consent of the United States Maritime Commission thereto was not first obtained.

Such defenses were not set forth in the repudiation letter of January 8, 1943 by which the underwriters declined all liability under these policies on the specific ground that the policies *were not in effect at the time of the loss*. Accordingly, such defenses should be overruled. *Ohio & M. R. Co.* v. *McCarthy* (1877), 96 U. S. 258, 267-268.

On the merits, the afterthought defenses of the underwriters should all be dismissed.

Even though the *Portmar* was "converted to a troopship on an independent voyage", in the abortive expedition toward Timor, it was involuntary on the part of the petitioner and the Master of the vessel, and without the knowledge of the petitioner, and thus, under the authorities, cited *post*, pp. 38-39, the policies remained in effect.

The *Portmar* was not "deliberately exposed to risk of loss". She was given every possible protection, and there was no causal relation between the service in which she was engaged and the loss. The *Portmar* received almost all the damage for which this suit is brought while lying at anchor in the harbor at Port Darwin after return from the Timor expedition, where she would have been if she had never sailed for Timor at all, but remained at Port Darwin. The nature of the cargo on board had nothing to do with the general attack that the Japanese aircraft made on all shipping at Port Darwin on February 19, 1942.

The tender of abandonment made by petitioner to the underwriters on April 8, 1942 was in all respects valid. It was not necessary that the consent of the United States Maritime Commission be obtained to a tender of abandonment. Having rejected the tender of abandonment, petitioners were excused from the useless act of obtaining consent of the United States Maritime Commission even though such consent were necessary.

FIRST POINT.

THE WAR RISK INSURANCE, BY THE TERMS OF THE ORIGINAL POLICIES AND THE SPECIAL "HELD COVERED" AGREEMENT OF FEBRUARY 6, 1942, CONTINUED IN EFFECT AND COVERED THE LOSS EVEN THOUGH THE VOYAGE HAD ALREADY BEEN FRUSTRATED.

(a) *The form of the policies.*

As already stated, the war risk insurance of the *Portmar* was against "the risks of war" and "all consequences of hostilities or warlike operations" and "risks of * * * military or naval aircraft and/or other engines of war * * * and warlike operations".

The insurance of the *Portmar* was on the voyage specified, but it insured only the safety of the vessel, not the completion of the adventure.

In *Alexander* v. *Baltimore Ins. Co.* (1808) 4 Cranch. 370, 374 Chief Justice Marshall said: (italics ours)

> "* * * They (the underwriters) insure her ability to perform her voyage, *not that she shall perform it.*"

See also Mr. Justice Story in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, 401 and *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, at pages 69-70 and 90-91. In the insurance of goods, the insurance is both against loss of the goods and against loss of the adventure unless the latter is excluded by the frustration clause. But the underwriters of the safety of a vessel are not concerned with and are not liable for the loss of the adventure. The inclusion of the frustration clause in hull policies makes that doubly clear. The Court of Appeals herein recognized that it does not apply to loss of the ship, but only to loss of the voyage. R. 798.

The war risk insurance policies of the *Portmar* did not refer to the charter, although the underwriters were informed that the *Portmar* was under charter to the U. S. Maritime Commission for the proposed voyage. R. 262.

The war risk insurance of the *Portmar* was written on the familiar form of a marine policy with an F. C. & S. Clause or warranty which excluded any claim for loss resulting from capture, seizure, and other causes including "all consequences of hostilities or warlike operations", with a war risk endorsement, the first of the War Risk Clauses of the present policies, covering all risks excluded by the F. C. & S. Clause from the marine policy. *Policies*, Exhibits 6, 7, and 8, R. 70-71. The pertinent clauses are set forth in Appendix I hereof.

This Court dealt with war risk insurance in similar form in *Standard Oil Company of New Jersey* v. *United States* (*The John Worthington*), (1950) 340 U. S. 54.

There is no question in this case that the loss was due to a cause covered by the terms of the policy if the policy was in effect at the time of the loss. The question of causation before this Court in *The John Worthington* is not here involved because the *Portmar* was damaged on February 19, 1942 by the direct attack by Japanese aircraft in the harbor of Port Darwin, Australia.

The decision below was that "* * * the policy was no longer in force when the loss occurred, the insured voyage having before then come to an end and the policy with it. * * *" R. 793.

Among other provisions the War Risk clauses of the present policies contained the following clauses:

> "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure

caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71, 598, 711-715.

For convenient reference, we shall call the first clause above quoted the "frustration clause"; and the second, sometimes called the "Free of British Capture clause", the "B. C. 2 rider" according to the letters at the end of its text.

It is petitioner's position that the clauses above quoted show that the parties anticipated a frustration or detainment of the voyage but did not intend that thereupon the policies would come to an end, because they did not say so, although it might easily have been so stipulated while the attention of the parties was on that subject.

The frustration clause provided only that no claim might be made for frustration of the voyage.* The force of the maxim *expressio unius, exclusio alterius* is inescapable, and the Court of Appeals could not avoid reference to it. R. 798.

It is conceded that the B. C. 2 rider was in common use. *Colloquy,* 228, 231. It was promulgated by the American Institute of Marine Underwriters, and used in other risks placed with Lloyds and the English companies during the period 1940-1945. *Grotefend,* R. 264-265.

The B. C. 2 rider specifically preserved and continued in effect the insurance of the vessel against loss by enemy attack notwithstanding that an arrest, restraint, detainment or requisition of the vessel had already occurred.

The unqualified language of the B. C. 2 rider bars the implication of an intent to terminate the policies on the occurrence of an event clearly provided for therein. So far from providing for termination of the policies, the underwriters agreed to continue the cover in any contingency named, provided that the vessel was not "condemned". That condition was fulfilled. The District Court found that the vessel was not condemned. R. 749.

The District Court rightly held that the losses for which petitioner claims were covered by the terms of the war risk policies in suit without any reference to the rider. R. 749.

The B. C. 2 rider did not constitute the insuring clause of the policies. It preserved and continued the insurance, otherwise contained in the policies, in effect notwithstanding the occurrence of one of the events stated.

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* The warranty excluding claims for loss of or frustration of the insured voyage was adopted in 1919 to avoid the liability imposed on underwriters in the insurance of goods in *Sanday & Co. v. British and Foreign Marine Ins. Co.* [1916] A. C. 650.

The underwriters endeavored below to avoid the effect of the B. C. 2 rider by distorting its obvious meaning and declared intent and by offering evidence to show that it meant something entirely different from what it plainly says. Their contentions in that respect betray their fear of its effect.

The meaning of the rider may be stated as follows:

> *"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from * * * Restraint, Detainment, Requisition * * * by or under the authority of the government of Great Britain or any of its dominions * * * or allies * * *"*

Petitioner has not made any claim against these underwriters arising from the restraint, detainment or requisition of the *Portmar*. The only claim in this suit arises from the damage sustained by the *Portmar* by enemy attack. But if it be suggested by the underwriters that because the damage occurred "during" restraint or requisition by the sovereign, the present claim is therefore "arising from" such restraint or requisition, the answer is that the further language of the rider preserves such damage from any exclusion by the first clause of the rider.

> *"* * * but unless the insured Vessel is condemned * * *"*

The *Portmar* was never condemned. R. 749.

> *"* * * this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war * * *"*

Petitioner's losses were "otherwise covered by the policy." See the terms "the risks of war"

which will be found on the face of the policies; "all consequences of hostilities or warlike operations" which are among the exclusions of the F. C. & S. Clause of the policies and which are assumed by the first paragraph of the War Risk Clauses; and "risks" of military or naval aircraft and/or engines of war * * * and warlike operations" which are contained in the amendment of the Adventures and Perils Clause as provided in the third paragraph of the War Risks Clauses contained in the policies. R. 798.

"* * * *provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention.*"

The damage sustained by the *Portmar* by enemy attack, and the stranding necessitated by such damages, were clearly excluded from the marine policy by the words "all consequences of hostilities or warlike operations" contained in the F. C. & S. Clause, and as so excluded were covered by the first paragraph of the "War Risk Clauses."

The decision of the Court of Appeals recognized that petitioner's contentions as to the effect of the B. C. 2 rider have "literal plausibility" R. 797-8. Thus the Court below conceded that petitioner's claim for the loss of the *Portmar* was at least within the letter of the policies.* The

* It was contended by the Underwriters below that the words "otherwise covered by this policy" mean only "in the absence of restraint, detainment or requisition." In other words, it was contended, and may be suggested here, that the B. C. 2 rider covered enemy attack and consequent stranding only if no arrest or restraint was in effect at the time. The fallacy of that contention is sharply shown by the testimony of their own witness, Winter, whom the underwriters called for testimony as to the "intent" of the draftsmen of the rider. His testimony was wholly inadmissible because the rider is concededly clear and unambiguous. R. 108, 746, 747-748. But it may be noted that Winter said that the intent was to

search for "intent" because the Court "could not believe" (R. 802) what the language of the policies says, confesses the force of the claim that the loss was within the provisions of the policies.

(b) *The "Held Covered" Clause contained in the original policies precludes any finding that the insurance terminated before the loss.*

In addition to the clauses above mentioned, the war risk clauses of the policies contained another clause which provided that the vessel would be "held covered" even in the event of "deviation or change of voyage", as follows:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured

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cover damage or loss while the vessel was under detainment by friendly powers for control port examination, Winter, R. 251. Thus he conceded at least that the intent was to cover losses which occurred not *in the absence of* restraint, detainment, etc. but *during* a restraint, detainment, etc.

Further, the underwriters' interpretation of the words "otherwise covered by this policy" makes the whole second clause of the rider redundant, for if their contention were sound, there was no need of it. All losses occurring *in the absence* of capture, seizure, requisition, etc., are covered by the war risk endorsement without reference to the B. C. 2 rider. It is plain that the word "otherwise" should be taken as used in its ordinary meaning, as "in other respects", and that here it means "but for this warranty", as if the foregoing warranty were not in the policy.

As to the "intent of the parties", the evidence offered by the underwriters was limited to what the Policy Form Committee of the American Institute of Marine Underwriters thought as to the meaning of the B. C. 2 rider and had in mind in its preparation. *Winter*, R. 250-251. No evidence was offered by the underwriters as to what shipowners understood that it meant. It is settled by this Court that if there is ambiguity, the intent of *both* parties must be sought. *Reed* v. *Insurance Co.* (1877), 95 U. S. 23. The District Court rightly disregarded all the evidence offered by the underwriters as to the "interpretation" of the rider, because the Court found that the rider was clear and not ambiguous. R. 747-748, 750.

and/or their managers and an additional premium paid if required."

Petitioner has not made any claim under the "Held Covered" clause, because it does not apply where the diversion is under compulsion of sovereign control. That clause was designed to cover a situation where the vessel *voluntarily* deviates from the voyage specified in the policies or where there is a *voluntary* change of voyage. It prevents the termination of the insurance protection even in case the vessel may without excuse depart from the limits of the voyage specifically described in the policy.

We have never contended that the present policies were continued in effect solely by virtue of the "Held Covered" clause, because it does not apply to a situation, and is unnecessary, where the deviation or change of voyage is *involuntary on the part of the assured. Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, 82-83, 109-110. Compare Section 46 of the British Marine Insurance Act, 1906, with Section 49-(1)-(b) and (d) of the same Act.

But if, as the cases hold, the "Held Covered" clause was designed to protect the assured and continue the insurance in effect, even where deviation or change of voyage occurred with the consent of the assured, then *a fortiori* the insurance should be held to continue in effect if a deviation or change of voyage occurs *without the consent or control of the assured.**

When the Court below said that petitioner's contention, although having "literal plausibility", overlooks the fundamental subject matter of the insurance, i.e., "the *Portmar*

* Even though the "Held Covered" clause of the policies applied, and an additional premium were due, the rate should not exceed 6½%, the rate quoted by the American Syndicate effective February 15, 1942. R. 656, also Exhibit 54 in Exhibit Volume separately submitted.

on the prescribed voyage" R. 798, the Court, in turn, overlooked the force of the "Held Covered" Clause and the explicit contemplation of government interference and control which might force the vessel, without the consent of the assured, to depart from the voyage specifically described at the head of the policies. What is the meaning of the term "prescribed voyage" as used by the Court of Appeals below? We submit that the prescribed voyage is not limited to direct passages between the termini described in the opening paragraph of the policy but under the decisions cited, post pp. 38-39, includes any deviation or change of the voyage which are forced upon the insured vessel against the consent of the Master or of the assured and even without the knowledge of the assured. The "Held Covered" clause goes even further, because it preserves the cover even though the deviation or change of voyage is voluntary on the part of the assured.

The decision of the Court of Appeals below "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802) is wholly incompatible with the express provisions of the "Held Covered" clause.

(c) *The special "Held Covered" agreement of February 6, 1942.*

In addition to the provisions of the policies and the effect of the authorities later cited, there are certain uncontroverted facts which should have precluded any such treatment of the case as is found in the opinion below. Here we refer to petitioner's cable message to the underwriters of January 24, 1942, and the underwriters' acquiescence, as stated in the letter from Stephens & Son of London, of February 6, 1942, both quoted *ante*, page 6.

The decision below, ignoring that specific agreement to hold the vessel covered, holds that petitioner was stripped of its war risk insurance by events which were beyond its control, consent and knowledge, (R. 157, 718-719, 721); and that after January 5, 1942 it was uninsured against the disaster that occurred by enemy attack on February 19, 1942 even though the underwriters had agreed on February 6, 1942 that the diversion of vessel to Australia on outward voyage, under government orders would be held covered "pending further advices".

No further information as to the movements of the vessel was received by petitioner until after the disaster.

On February 19, 1942 (New York date) petitioner received a letter from the Maritime Commission to the effect that the *Portmar* arrived at Darwin on February 12, 1942. R. 145-146. The enemy attack on the *Portmar* had already occurred (Australian date). The next word came on February 23, 1942 when I. M. Holt of the War Shipping Administration telegraphed petitioner that the *Portmar* had been reported through British channels to have been damaged in an air raid at Port Darwin. R. 734. Thus no "further advices" could be given by petitioner to the underwriters before the loss.

The uncontroverted evidence of that cable message and letter were called to the attention of the Court in brief and argument. They were not mentioned in the opinion of the Court of Appeals below, and were therefore set forth and again called to the attention of the Court in the petition for rehearing. R. 806-811.

Petitioner did everything that a prudent shipowner could do to place war risk insurance which would be coextensive with the time and area of the vessel's employment under the time charter, by insuring the vessel not only for the voyage specifically described in the charter, but also

> voyage or adventure. Its language cannot, in my opinion, be twisted to make it exclude a claim for actual loss of or damage to the goods themselves. Even if I felt any doubt about this, which I do not, *I should still say that it is for an underwriter who has undertaken a particular insurance, if he desires to make exceptions from it, to do so in clear terms. An ambiguous exception is no defence. However, I do not think the exception is even ambiguous.*"

The British underwriters herein, with generations of experience and world-wide sources of information, signed the slips which originated the present war risk insurance on November 26th and 27th, 1941, in full contemplation of the explosive situation then developing in the Pacific. *Slips,* R. 584-5; *Historical Facts,* appendix III.

Section 18-(3)-(b) of the British Marine Insurance Act, 1906, declares that the insurer is presumed to know matters of common notoriety or knowledge.

In *Buck* v. *Chesapeake Ins. Co.* (1828), 1 Pet. 151 at page 160 this Court said:

> "* * * A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms used in their contract, must necessarily be imputed to underwriters. * * *"

Proctor for the underwriters conceded on the trial that the language of the B. C. 8 rider was clear and unambiguous. R. 108. The expert witness Winter called by the underwriters at the trial as to the interpretation of that rider agreed that it was unambiguous. There are no "words of art" in it which require construction. R. 246.

The District Court found that the B. C. 2 rider is not ambiguous. (R. 747) and that its meaning is clear. R. 748. The Court of Appeals did not make any finding to the contrary.

In the absence of ambiguity the only question before the Court is the meaning of the rider as declared by its language.

> *Home Ins. Co.* v. *Baltimore Warehouse Co.*, (1876) 93 U. S. 527, 541-542;
> *Calderon* v. *Atlas Steamship Co.* (1898), 170 U. S. 272;
> *United States* v. *Choctaw, etc. Nations* (1900), 179 U. S. 494;

It is therefore beyond question, in view of the provisions of the policies that the parties, on the eve of war, recognized the possibility of orders by the British Government or any of its Allies (thus including the United States), which might constitute a restraint of the movements of the vessel; and agreed that while the underwriters would not be liable for any claim by petitioner for frustration of the voyage, the insurance would nevertheless cover damage by enemy attack so long as the vessel was not "condemned".

Instead of enforcing the intent of the policies so clearly declared, the Court of Appeals, acknowledging that it had no precedent for it, R. 798, did what this Court and other courts have refused to do under similar circumstances. It granted the underwriters gratuitous release from liability, which they were denied in England in *Rickards* v. *Forestal etc. Co.* [1942] A. C. 50, by injecting into the policies a limitation of the underwriters' undertaking which was not contained in the explicit provisions of the contract, and which is inconsistent with its express provisions.

While the Court of Appeals undertook to "interpret" the language of the policies (R. 802) it did so without specifying in what respect the language of the policies was ambiguous or obscure.

The Court of Appeals conceded that the effect of the B. C. 2 rider was to impose on the underwriters "some extension of his liability upon such risks as he continues to assume pending the 'restraint'." The Court then went on to draw the line beyond which the "extensions" would not go. The vice of such treatment of an insurance contract is that the insured shipowner learns, ten years after the event, that his vessel was not covered as to a loss directly due to a peril named in the policy, squarely within the terms of the B. C. 2 rider, and even though he had obtained, before the loss, a special agreement that his vessel would be "held covered"! And this astonishing conclusion is grounded on the point that even though the underwriters did not say so, they should not be deemed to have intended to have insured the loss of the ship under such circumstances. The declared intent of the parties is ignored, and the Court's idea of what the underwriters would have intended "if faced in advance with the actual event" (R. 802) is substituted therefor.

In truth, the parties *were* "faced in advance with the actual event." In November, 1941, it was as well known to everyone connected with shipping, as it is now, that one of the first steps taken by a Government on declaration of war is requisition of shipping. As was well pointed out by the District Court, R. 751, the risks of war may take many forms. One of the events which may be anticipated in war is that a sovereign may seize, requisition and take a vessel. It is not only contrary to the common knowledge and understanding of the shipping business and the marine insurance world, but is against the actual words of the policies, to hold that a constructive total loss by enemy attack after a

requisition of use by the sovereign was a loss which the underwriters never contemplated.

The rule of construction "*contra proferentes*" was recognized by the Court of Appeals but that rule was not followed. Thus even though the B. C. 2 rider were ambiguous, which it is not, the Court of Appeals below "interpreted" the policies directly against the decisions of this Court:

National Bank v. *Insurance Co.*, (1877) 95 U. S. 673, 679;
Travellers Ins. Co. v. *McConkey*, (1888) 127 U. S. 661, 666;
Hagan v. *Scottish Ins. Co.*, (1902) 186 U. S. 423;
Royal Ins. Co. v. *Martin*, (1904) 192 U. S. 149, 162;
Mutual Life Ins. Co. v. *Hurni Packing Co.*, (1923) 263 U. S. 167.

If the underwriters wished to limit their undertaking stated in the language used, they should have said so, as stated by the District Court. R. 750-751. It would have been a simple matter for a limitation to have been included in the policy, especially where the attention of the underwriters was focused on the matter of frustration of the voyage and on the effect of an arrest, restraint, detainment or requisition of the vessel by the British Government or any of its Allies.

On the authorities cited, we submit that the error of the Court of Appeals below is clear and that it is immaterial whether or not a frustration of the voyage occurred on January 5, 1942 or at any other time before the loss. The policies continued by virtue of their explicit provisions, notably the B. C. 2 rider, and were in effect on February

19, 1942 when the *Portmar* became a constructive total loss by reason of enemy attack.

(e) *Departure of the vessel from the insured voyage or change of her voyage does not relieve the underwriters of liability for loss due to a peril insured against, if such event is involuntary on the part of the assured.*

It is settled that marine or war risk insurance of a vessel remains in effect throughout and after diversion from the course of the voyage as described in the policy, or change of voyage, if the departure from the proposed voyage is *involuntary* on the part of the assured.

Robinson & Robinson v. *Marine Ins. Co.*, (1806) 2 Johns (N. Y.) 89;
Post v. *Phoenix Ins. Co.*, (1813) 10 Johns. (N. Y.) 79;
Graham v. *Commercial Ins. Co.* (1814) 11 Johns. (N. Y.) 352;
Scott v. *Thompson* (1805), 1 Bos, & Pul. (N. R.) 181; 127 E. R. 429;
Rickards v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, 82-83;
British Marine Insurance Act, 1906, Section 45-(1); Section 46-(1); Section 49-(b), (d) and (e).

In the *Rickards* case, *supra*, the vessels were changed by orders of the German Government from peaceful cargo vessels into enemy blockade runners with English cargo on board, but the underwriters of the cargo were held liable for loss of the cargo when two of the ships were scuttled by their own masters on being overtaken by Allied cruisers.

In *Aktiebolaget etc. Bank* v. *American M. M. Ins. Co. (Ada)* (1925) 241 N. Y. 197 the New York Court of Appeals held on the facts there involved that there was a *voluntary* departure from the insured voyage and that the under-

writers were thus relieved from liability. But in the course of the opinion the Court recognized the principle above stated. To the same effect: *Maryland Ins. Co.* v. *LeRoy et al.* (1812), 7 Cranch 26; *Burgess* v. *Equitable Mar. Ins. Co.* (1878), 126 Mass. 70, 79; *Audenreid* v. *Mercantile Mut. Ins. Co.* (1875), 60 N. Y. 482.

These were the authorities cited and on which the District Court relied in holding that the policies were in effect at the time of the loss. R. 745-746.

Against the weight of the authorities above cited, respondent underwriters relied below on *O'Reilly* v. *Royal Exchange Ins. Co.* (1815), 4 Camp. 246. But that was only a decision at *nisi prius* and has been thoroughly discredited by the leading writers on both sides of the Atlantic. See *Arnould on Marine Insurance,* Thirteenth Edition, page 420, Section 435; *Phillips on Insurance,* (1867), page 588, Section 1025.

The British Marine Insurance Act, 1906, codified the then existing English case law on the subject. *Rickards* v. *Forestal etc. Co. Ltd.* [1942]; A. C. 50, 79. *Arnould* on *Marine Insurance,* Thirteenth Edition, page 3, Section 1.

In Section 49-(1)-(b) that Act declared the law as stated in the cases above cited and contrary to the *O'Reilly* case.

The underwriters contended below that the policies came to an end before the loss because after the vessel discharged her outward cargo she was ordered into service by the military authorities. R. 113. They pleaded that they insured the *Portmar* only on a "commercial" voyage (R. 80-81) and stressed many ordinary commercial terms of the basic marine policy form. This contention fails because on November 26, 1941 it could hardly have been thought that a vessel under charter to the United States

Maritime Commission, as the underwriters were informed (R. 262) for a voyage to the Philippines and return, was on an ordinary commercial venture.

In arriving at a conclusion in direct conflict with the authorities, and in holding that an insured shipowner may be stripped of his insurance by reason of events occurring without his consent or even knowledge, and thus without any opportunity to take steps to replace the coverage, the Court of Appeals below failed to give effect to the facts that what occurred in Australia was entirely involuntary on the part of petitioner, and that the terms of the B. C. 2 Rider explicitly covered the loss even though, contrary to our contentions hereinafter set forth, it is held that a frustration of the voyage by restraint of princes had already occurred.

It begs the question to say that the insurance covers the vessel only while on the voyage specified in the policy. The B. C. 2 rider and the "Held Covered" clause of the policies contemplate that the vessel may deviate from the specified voyage or that the voyage may be changed, but the vessel shall nevertheless remain insured. Thus the departure, or the change of voyage, becomes part of the voyage covered by the policy. The authorities cited, *ante*, pp. 38-39, are conclusive on the point that departure from the specified voyage, where involuntary, does not release the underwriter.

(f) *The decision of the Court of Appeals below is in conflict with the decision of the House of Lords in Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50.

In the *Rickards* case, British goods on three German ships at the outbreak of World War II were carried off when the German shipmasters obeyed orders of the German

Government to take refuge in neutral ports, and, if possible, to return to Germany with their cargoes; or, as a last resort, to scuttle their vessels. The goods were insured by Lloyds' policies against both marine and war risks. The three vessels turned away from their voyages and made for neutral ports, and then, with their cargoes on board, attempted to run the Allied naval blockade and get back to Germany. Two were scuttled when overhauled by Allied cruisers; the third got through to Hamburg.

There is a close parallel between the facts of the *Rickards* case and those of the present case. All the policies contained a warranty excluding any claim for loss by frustration of the voyage, and the "Held Covered" clause. In both cases the insured property was damaged or lost by enemy action; in the present case by enemy aerial attack, in the *Rickards* case by acts of the masters of the German ships who became enemies of the British cargo owners upon the declaration of war in September, 1939.

In both cases the insured property was restrained by sovereign control without the knowledge or consent of the assured.

With the facts thus similar, the trial court in the *Rickards* case held that the voyage was frustrated by sovereign restraint, and the underwriters thereby released from liability. In the present case the Court of Appeals below reached a like conclusion.

The decision of the trial court in the *Rickards* case was reversed on appeal. The decision of the Court of Appeals herein is in direct conflict with the decisions of the Court of Appeal and of the House of Lords in the *Rickards* case.

The House of Lords in the *Rickards* case held that the meaning of the clause which warranted the policy free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrest, restraint or detainment of kings, princes, peoples, etc. was that only such

claims as could be made *solely because of frustration of the voyage* were barred by the exclusions of that warranty. See the remarks of Viscount Simon, Lord Chancellor, [1942] A. C. at page 65. Even though it appeared that a frustration of the voyage had occurred, the House of Lords held that there was a constructive total loss of the goods when the vessels quit neutral ports in an attempt to run the Allied blockade and that the constructive total losses of the goods were converted into actual total losses in the cases of the *Minden* and the *Halle* when the ships were scuttled, and as to the *Wangoni*, when the vessel arrived at Hamburg; that the British owners of the insured cargoes had a clear claim for loss of the goods, whether constructive or total, because the policies continued to cover the safety of the goods, irrespective of whether any claim for frustration of the voyage was barred by the warranty excluding such a claim.

Accordingly, it was held, regardless of whether a frustration of the voyages occurred or whether any claim against the underwriters was precluded by the warranty which excluded claims based upon frustration of the voyage, that the underwriters were liable under the policies for the total loss of the goods, constructive or actual, and that the policies survived the "frustration" of the voyage on quitting neutral ports to run the Allied blockade.*

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* In the Court of Appeal, in dealing with the underwriters' contentions and the decision of the trial judge, MacKinnon, L. J. said, [1941] 1 K. B. 225 at page 250:

> "I think it is unnecessary to discuss further this misconception as to the nature of a policy on goods. I would only add that, if Hilbery J.'s view were correct, the assured under this policy must have accepted the most fatuous and worthless contract ever made by a sane man. The policy solemnly insures his goods against loss by war perils and his being thereby deprived of them, but the frustration clause, on the judge's reasoning, would in every case of such deprivation that I can imagine make that promise absolutely nugatory!"

It is of no consequence that in the *Rickards* case the insurance was upon goods, whereas here the insurance was upon a vessel. In each case the safety of the insured property was the prime subject of the insurance.

The following quotations from the opinions of the House of Lords [1942] A. C. 50, show that the war risk insurance of the goods did not terminate if the voyages were "frustrated", but remained in effect and covered the actual total loss of the goods: (italics ours)

Lord Wright, at page 88;

"* * * If the sailing from Rio under the orders of the German government did not give a claim to a constructive total loss because, for instance, there was no proper notice of abandonment, *still the insurance continued. As I have explained, the policy was not avoided by the deviation or change of voyage. The property in the goods still remained in the assured and was still covered by the policy.* * * *"*

Lord Porter, at pages 110-111; (italics ours)

"There remains to be considered whether there was at any time a loss, for which the assured can recover, by a peril insured against. At some time each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea according to circumstances. *At that moment the insured voyage came to an end, but it does not follow that at that moment the underwriters ceased to have any further liability for the goods which they had covered.* * * * From the time the master broke off from his contractual voyage to return to Germany, whether that be when he made up his mind to abandon the voyage (as Arnould seemed to think from his observations in s. 380), or whether it be when that purpose was manifested—to use the word found in the Marine Insurance Act, 1906, s. 45, sub-s. 2—or whether the true inference is that the moment to be chosen is when the ships left their last port of refuge, the owners were deprived of their goods which henceforward remained in the control of the German government and in the grip of their restraint until they were lost by the Master's action in scuttling his ship. For this purpose it is immaterial that they had previously been seized. That seizure would or would not amount to a constructive total loss according to whether the assured was or was not likely to recover them and what expense he would incur in doing so. *But that loss, whether partial only or constructive and total, was by the scuttling converted into an actual total loss while the goods were still covered by the policy."*

These conclusions of the House of Lords were reached apart from the provisions of the "Held Covered" clause. [1942] A. C. 50, 82-83, 109-110. The "Held Covered" clause was held to operate only in the event of voluntary deviation or change of voyage, not where the departure is involuntary.

There is a striking similarity between the facts of the present case and those of the *Rickards* case. The decision of the Court of Appeals below cannot be reconciled with the decision of the House of Lords in the *Rickards* case.

It is therefore submitted, that whether the voyage originally described in the policies was frustrated or not, the war risk insurance policies were in effect at the time of the loss, and covered the loss even without reference to the fact that the underwriters, on February 6, 1942, specially agreed to hold the vessel covered.

(g) *The risks of the prescribed voyage were not increased.*

A further assumption in the opinion of the Court of Appeals is directly contrary to the facts of record. It was stated by the Court that "in the case at bar the requisition added *so notably to the risks of the prescribed voyage* that the voyage ceased to be the same." R. 801, (italics ours).

The very reason for the diversion of the *Portmar* to Australia, from her prescribed voyage to the Philippine Islands was the outbreak of war between Japan and the United States on December 7, 1941. Under the actual conditions of Japanese control of the sea it was virtually certain that the vessel would have become a total loss if she had proceeded on the prescribed voyage.

Under those undeniable circumstances there is no factual basis for the Court's holding that the diversion of the vessel to Australia or the uses to which she was put in Australia were in any way more dangerous than the certainty of total loss if the vessel had continued on the "prescribed voyage".

It is therefore submitted that the war risk insurance policies of the *Portmar* continued and covered the loss even though the voyage had already been frustrated.

SECOND POINT.

THE ROUND VOYAGE SPECIFIED IN THE WAR RISK INSURANCE POLICIES AND IN THE CHARTER OF THE *Portmar* WAS NOT FRUSTRATED BEFORE THE LOSS.

Because of the explicit terms of the time charter of the *Portmar* between petitioner and the United States Maritime Commission, the voyage was not "frustrated" either in law or in fact at any time before the vessel became a constructive total loss on February 19, 1942.

Petitioner contends that the question whether or not a frustration occurred on the uncontroverted facts of this record is a question of law which may be raised by petitioner for review by this Court. But if frustration of the voyage is to be deemed a question of fact, then petitioner contends that divergence between the findings on the District Court, R. 746, 751 and the findings of the Court of Appeals, R. 793, 802, should be resolved by this Court in petitioner's favor, to the effect that as a matter of fact no frustration occurred.

(a) *The charter provisions anticipated and provided for the events which occurred.*

The Court of Appeals below made the following statement in the course of the opinion: "The policy upon a voyage charter must be understood to be coextensive with the voyage, * * *". R. 801. It is therefore clear that when the Court of Appeals below referred to circumstances which "commercially speaking, put an end to—frustrate—the venture as the parties contemplated it" (R. 801) the "venture" was the voyage provided for in the charter of the *Portmar*.

under the "Held Covered" clause, in the event of deviation from or change of that voyage. Further, it notified the underwriters that the *Portmar* had been diverted to Australia under government orders and received their specific agreement to hold the vessel covered pending further advices.

Even though the principles hereinafter discussed were not sufficient for the conclusion that the underwriter should not be relieved from liability by implied conditions in view of the express stipulations in their policies made on the eve of war in full contemplation of the possibility of Government restraint of the vessel, their unqualified agreement made after the date on which the Court below found that the insurance terminated, to hold the vessel covered under the known circumstances that the vessel was operating in Australia under government orders, should be regarded either as a continuance, or reinstatement, of the policies.

If the decision below is allowed to stand, petitioner was subjected to as vicious an entrapment as could be imagined. Having no knowledge of the extent of the military controls in Australia, petitioner sought confirmation of its insurance. The underwriters, being expressly informed by Mather's cable message that the *Portmar* was "diverted to Australia on outward voyage under government orders," nevertheless agreed to hold the vessel covered. If the underwriters had notified petitioner that they refused to "hold covered", petitioner would have had a chance to obtain other insurance. But the underwriters did not decline the request; they specifically agreed to it. On what ground can underwriters be justified in repudiating this agreement?

The special agreement contained in that cable and letter provides evidence of the intent of the parties which should

The doctrine of frustration rests on the equitable principle that if it appears that in making a contract the parties contemplated the continued existence of a certain thing or state of affairs, and if the contract contains no specific provision dealing with the unforeseen contingency which has occurred, then, if it appears that the parties would have, if they had thought of it, provided for termination in such event, the Court will imply a condition to that effect. *Texas Company* v. *Hogarth Shipping Co.* (1921), 256 U. S. 619; *F. A. Tamplin S. S. Co.* v. *Anglo-Mexican Petroleum Products Co.* [1916] 2 A. C. 397, 406; *Blane Steamships, Ltd.* v. *Minister of Transport* (C. A.), [1951] 2 Ll. L. L. R. 155, 160; *Taylor* v. *Caldwell,* (1863) 3 B. & S. 826.

There is no room for the doctrine of frustration in this case, because the parties here made specific provisions which anticipated and provided for the very events which occurred.

The time charter of the *Portmar,* R. 18-38, contained, among others, the clauses set forth in Appendix II.

The final provisions of Article 2.27 are directed to the suspension of charter hire under the provisions of Article 2.04-(b). The result is that the charter did not provide any exception from the obligation of the charterer to pay hire in the event the vessel should navigate under direction of naval, military, Coast Guard or other governmental authorities even though damaged while so engaged. No other general exceptions of the charter may relieve the charterer from the obligation to pay the hire. *Clyde Commercial Co.* v. *West India Steamship Company* (2 Cir. 1909), 169 Fed. 275.

These charter provisions go far beyond the "conventional clause providing for exemption from liability in the event of 'restraint of princes'" referred to in the opinion of the Court of Appeals below at R. 801. The conventional

restraint of princes clause found in the charter cases relied upon by the Court of Appeals below, R. 798-800, provides only a shield against liability for nonperformance. It does not provide for what is to happen in the event that a restraint of princes occurs. That distinction was clearly stated in the *Isle of Mull* (4 Cir. 1921), 278 Fed. 131, at page 134, where the Court said:

> "The restraint of princes clause is intended for the protection of the party whose ability to carry out his contract is destroyed or impaired by the enumerated clauses. The other party cannot avail himself of it to escape his obligations. * * *"

The same shield against liability is found in the provisions of Article 2.16 of the present charter. But the fact that no exception is provided as to payment of charter hire for the time consumed by the vessel if out of service because of damage sustained while navigating under the direction of naval, military, Coast Guard or other governmental authorities as stated in Article 2.04, the provisions that under such circumstances anything done or not done by the vessel shall be a fulfillment of the contract voyage (Article 2.15) and shall not be deemed a deviation, breach of orders or neglect of duty by the Master (Article 2.27), go far beyond the ordinary defensive scope of the conventional restraint of princes clause referred to by the Court of Appeals below, and provide affirmatively for performance of the contract following the intervention of sovereign control.

In the light of these clauses, the charter frustration cases relied on by the Court of Appeals below do not support the conclusion that the war risk insurance came to an end, or that the voyage of the *Portmar* was frustrated before the loss occurred. To the contrary, in both *Tamplin Steamship Company* v. *Anglo-Mexican Petroleum Products*

satisfy any inquiry as to actual intent. For here was a declaration by the parties of their intentions, made after the event on which the Court below found a frustration of the voyage and termination of the policies, and before the loss occurred. What better evidence of intent could there be?

The decision below that the underwriters were discharged from liability under the policies by governmental restraint which frustrated the voyage, should be reversed if for no other reason than the fact that on February 6, 1942 before the loss occurred on February 19, 1942, with knowledge that the vessel was in Australia under government orders, they agreed to hold the vessel covered.

(d) *The declared intent of the parties should control.*

The fundamental error of the decision below is that the Court, in disregard of the declared intent of the parties, and on the supposition that the underwriters would have refused to undertake the risk if they had been faced in advance with what was later to occur, read into the insurance policies a qualification or exception that the underwriters did not put there by their own language and which is inconsistent with the specific provisions of the policies. The judge who wrote the opinion apparently forgot that in an earlier case he had expressed the opposite view and held the parties to their declared intent. In *Eustis Mining Co.* v. *Beer, Sondheimer & Co.*, (SDNY 1917), 239 Fed. 976, he said:

> "• • • It makes not the least difference whether a promisor actually intends that meaning which the law will impose upon his words. The whole House of Bishops might satisfy us that he had intended something else, and it would not make a particle of difference in his obligation. • • •"

It passes understanding how the same judge could have so far departed from the sound principle which he stated in the *Eustis* case, as to hold herein the exact reverse of his statement in that case. Again, he cited the case of *F. A. Tamplin S.S. Co. Ltd. v. Anglo-Mexican etc. Co. Ltd.* [1916] 2 A. C. 397 as a leading authority on the subject, apparently overlooking the following language of Lord Parker, [1916] 2 A. C. on pages 422-423:

> "* * * It is, of course, impossible to imply in a contract any term or condition inconsistent with its express provisions, or with the intention of the parties as gathered from those provisions. The first thing, therefore, in every case is to compare the term or condition which it is sought to imply with the express provisions of the contract, and with the intention of the parties as gathered from those provisions, and ascertain whether there is any such inconsistency."

See also the extension of those remarks, [1916] 2 A. C. at pages 426-428, and *Larrinaga & Co. Ltd.* v. *Société Franco-Americaine etc.,* (House of Lords, 1923) 39 T. L. R. 316, 320.

It is a fundamental principle of the law of contracts, and consequently of insurance policies, that the declared intent of the parties should control; and that the Court should reach the meaning of the parties through the words they have used.

Home Ins. Co. v. *Baltimore Warehouse Co.,* (1876) 93 U. S. 527, 541-546;
Travellers' Insurance Co. v. *McConkey* (1888), 127 U. S. 661, 666;
Allanwilde Transport Corporation v. *Vacuum Oil Co.* (1919), 248 U. S. 377;

Clyde Commercial Steamship Company v. *West India S.S. Company* (2 Cir. 1909), 169 Fed. 275; cert. den. 214 U. S. 523;
The Thames & Mersey Ins. Co. v. *Hamilton, Fraser & Co.* [1887] A. C. 484, 490;
Adams et al. v. *Mackenzie* (1863), 13 C. B. (N. S.) 442, 143 E. R. 175;
A/S. Ocean v. *Black Sea & Baltic Gen. Ins. Co.* (C. A. 1935) 51 Ll. L. L. R. 305.

See also: *Maryland* v. *Railroad Company* (1874), 22 Wall. 105, 112-113; *Railroad Companies* v. *Schutte* (1880), 103 U. S. 118, 140.

In *Allanwilde Transport Corporation* v. *Vacuum Oil Co.* this Court said, 248 U. S. at page 385: (italics ours)

> "• • • There were expected hazards and contingencies in the adventure and we must presume that the contract was framed in foresight of both and in provision for both. *We cannot step in with another and different accommodation.* • • •"

More recently the House of Lords in *Rickards* v. *Forestal etc. Co. Ltd.* [1942], A. C. 50, by Viscount Maugham, referring to the contention of the underwriters that the frustration clause barred the claim for loss of the goods, said at pp. 72-73:

> "• • • The first thing that occurs to one is that it would have been exceedingly easy to draft the clause so as undoubtedly to have this wider effect if that had been the intention. Next, if the matter is left in doubt, the clause must be construed *contra proferentes*, plainly in this case the underwriters."

and by Lord Wright at pages 91-92: (italics ours)

> "• • • The exception by its language is expressly limited to the loss of or frustration of the insured

The record completely demonstrates that both parties intended, until the constructive total loss of the vessel, to complete the "round voyage".

It is, to say the least, unprecedented, as conceded by the Court of Appeals (R. 798) that the performance of a contract should be held frustrated, where the parties to that contract thought it was in effect and were continuing with performance so far as government restraint permitted. The Court has thus imposed upon the parties to the charter a decision which they themselves did not make at the time.*

(c) *The test of "frustration"*:

The Court of Appeals at R. 800 said "* * * In all such cases the prospective length of the interruption on which the putative 'frustration' depends, must be decided by the situation as it appears at the time of the interruption."

Instead of applying that well settled rule (*Allanwilde Transport Co.* v. *Vacuum Oil Co.*, (1919) 248 U. S. 377, 386; *Bank Line Ltd.* v. *Arthur Capel & Co.*, [1919] A. C. 435, by Lord Sumner at p. 454; *The Claveresk*, (2 Cir. 1920), 264 Fed. 276, 282-283; *Borup* v. *Western Operating Corporation*, (2 Cir. 1942), 130 F. 2d 381, 386), the Court of Appeals departed from it, and used hindsight of the events which occurred later on to support a holding that as of January 5, 1942, although neither of the parties to the contract, nor their proctors at the trial, thought so, the voyage was at the end.

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* In *Bank Line, Ltd.* v. *Arthur Capel & Co.* [1919], A. C. 435, at page 460, Lord Sumner concluded his opinion with a remark exactly the reverse: (italics ours) "* * * Both thought its result was to terminate their contractual relation by the middle of June

There is not any evidence of any orders with respect to the *Portmar* on January 5, 1942 or at any time before the loss of February 19, 1942, to the effect that the *Portmar* would not be allowed, within a reasonable time, to complete her round voyage. The facts are to the contrary. The passages from port to port in Australia were a distribution of the outward cargo according to the needs of the Army, the shipper of the cargo. R. 522, 525-529. That was no different from what the *Portmar* would have done in the Philippines if the war had not occurred and if she had gone to the Philippine Islands in accordance with the charter.

These facts before the loss on February 19, 1942, do not show that there was any such urgent military need for the *Portmar* as the Court of Appeals has found, relying solely on the testimony of Colonel Plant. R. 795. Colonel Plant did not arrive in Australia until the end of March, 1942. R. 183. The military situation and emergency of which he had actual knowledge arose from the circumstances which existed after his arrival in Melbourne. R. 183-5. The fact that on February 4, 1942 the *Portmar* was ordered from Port Darwin to Wyndham, R. 293, with only 2000 drums of gasoline, and returned from Wyndham to Darwin empty of any cargo, R. 721, hardly indicates any such critical military need for the use of the vessel *at that time*, as the Court of Appeals below has found from Colonel Plant's testimony as to events which occurred much later.

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and, *as they must have known much more about it than I do, there is no reason why I should not think so too.* * * *"*

It may also be noted that the Court of Appeals below held that a frustration of the voyage occurred at a point not pleaded by the underwriters in their answer, R. 78-84, and not included in the declaration of their proctors when questioned by the District Court. R. 113.

The sailing to the port of Koepang, Timor was no more than a temporary incident, after she was free of outward cargo. When the *Portmar* returned to Darwin from that expedition on February 18th she was ordered to berth in her turn and discharge the artillery and troops which were then on board. The Timor expedition was ended. There were no further orders whatever with respect to the *Portmar* except, as already seen, that she was fixed by the U. S. Maritime Commission for the return leg of the round voyage, from New Caledonia to Philadelphia with a cargo of chrome ore. R. 142-143, 720, 796-797.

Accordingly, it is submitted that no frustration of the voyage occurred because of the provisions of the charter under which the vessel was employed on the round voyage; because governmental restraint was contemplated and provided for in the provisions of the charter; because the evidence shows that at the time of the loss arrangements had been made for a return voyage of the *Portmar* with chrome ore from New Caledonia for Philadelphia; and because the parties, as late as June 15, 1944, treated the round voyage as in effect until the constructive total loss of the vessel on February 19, 1942. *Computation of Hire*, Exhibit 24 (separate volume submitted).

THIRD POINT.

THE *Portmar* WAS A CONSTRUCTIVE TOTAL LOSS WITHIN THE PROVISIONS OF THE WAR RISK POLICIES.

The Court of Appeals below did not actually decide that the *Portmar* was a constructive total loss as a result of enemy attack which occurred on February 19, 1942 but it assumed that the vessel became a constructive total loss

through such attacks. R. 793. The whole tenor of the decision below reflects the conviction that if the policies were in effect, the loss was clearly covered and that the vessel was a constructive total loss within the terms of the policies.

The damages inflicted on the vessel by the Japanese attacks were summarized by the District Court in the eighty-fifth finding of fact. R. 730-731. See also *Michelson*, R. 310-324, 358, 362-364, 532-535, 1594-1605; *Bullock*, R. 472-478.

It was the judgment of the master of the *Portmar* that salvage was impossible and that the vessel was a constructive total loss. *Michelson*, R. 350, 355. Petitioner was so informed by cable messages late in March, 1942. R. 734. The Chief Officer of the *Portmar*, who also held a Master's license, was of the same opinion. *Bullock*, R. 496-506.

The United States Naval observer at Melbourne said that the vessel could not be salvaged as a cargo carrier. Petitioner was so informed by War Shipping Administration on April 4, 1952. *Letter*, R. 606; 734-735.

The *Portmar* was never "recovered and repaired" in the sense that she was restored to the condition and insurance classification which was hers before the enemy attacks. R. 195-196, 738.

The District Court found that after the *Portmar* was beached on February 19, 1942, and when petitioner tendered abandonment of its interest in the vessel to the underwriters on April 8, 1942, there was imminent peril of actual total loss by Japanese invasion of Northern Australia, and that it was impossible for petitioner to recover the vessel and to repair and restore her to her former condition, R. 730-737; that the "high probability" rule applied as to costs of recovery and repair. R. 752-754. Accordingly, the District

Court held that the *Portmar* was a constructive total loss within the policies. R. 752, 754.

(a) Imminent peril of actual total loss; recovery and repair impossible.

The extensive damages sustained by the vessel, the imminent peril of actual total loss by Japanese invasion of Northern Australia, the practical impossibility of recovery and repair by the owner or by any commercial salvor in view of the war situation, domination of the sea and air around the North and East coasts of Australia by the Japanese navy and air force, the unavailability of salvage equipment, towing vessels, drydock and repair facilities, have all been established by findings of fact on uncontroverted evidence. R. 730-732; 735-737. See also *Plant*, R. 193; *Michelson*, R. 350, 355, 357-359; *Bullock*, R. 496, 505-507.

The right of the assured to claim a constructive total loss in the event of disaster to the insured property has long been recognized. *Rhinelander* v. *Ins. Co. of Pennsylvania* (1807) 4 Cranch. 29; *Peele* v. *Merchants Ins. Co.* (1822) Fed. Cas. No. 10905, 3 Mason 27; *Adams* v. *Mackenzie* (1863) 13 C. B. (N. S.) 442; 143 E. R. 175; *Mason* v. *Marine Ins. Co.*, (6 Cir. 1901) 110 Fed. 452; *Phillips on Insurance*, V. 2, page 227, Sec. 1492. The reason for it was recently restated in *Rickards* v. *Forestal, etc., Co. Ltd.*, [1942] A. C. 50, 83. See also *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582.

The burden of dealing with the wreck is properly that of the underwriter, who is paid a premium for such service. The assured is entitled to "disentangle himself," to receive his capital, and to use it in new enterprise. *Rickards* v.

Forestal etc. Co., supra; Hamilton v. *Mendes,* (1761) 2 Burr. 1198, 1209; 97 E. R. 787, 793.

The classic statement of the right of abandonment for total loss, made by Mr. Justice Story in *Peele* v. *Merchants Ins. Co.,* 19 Fed. Cas. at page 111* is quoted in Phillips on Insurance, V. 2, page 244, Sec. 1519, as a "scientific and accurate definition of total loss". It is so regarded in England. Arnould on Marine Insurance, 13th Ed., V-2, Sec. 1099.

To the same effect: *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. (37 U. S.) 378, 398; *Royal Exchange Assurance* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32; *Allen* v. *Sugrue,* (1828) 8 B & C 561; 108 Eng. Rep. 1151; *Irving* v. *Manning,* (1847) 1 H. L. Cas. 287; 9 Eng. Rep. 766; *Young* v. *Turing,* (1841) 2 Scott 752; 133 Eng. Rep. 883; *Sailing Ship Blairmore* v. *Macredie* [1898] A. C. 593; *Holdsworth* v. *Wise* (1828), 7 B & Cr. 794; 108 E. R. 919.

" * * * The right of abandonment has been admitted to exist, where there is a forcible dispossession or ouster of the owner of the ship, as in cases of capture; where there is a moral restraint or detention, which deprives the owner of the free use of the ship, as in case of embargoes, blockades, and arrests by sovereign authority, where there is a present total loss of the physical possession and use of the ship, as in case of submersion; *where there is a total loss of the ship for the voyage, as in case of shipwreck, so that the ship cannot be repaired for the voyage in the port, where the disaster happens; and, lastly, where the injury is so extensive, that by reason of it the ship is useless, and yet the necessary repairs would exceed her present value.* None of these cases will, I imagine, be disputed. If there be any general principle, that pervades and governs them, it seems to be this, *that the right to abandon exists, whenever from the circumstances of the case, the ship, for all the useful purposes of a ship for the voyage, is, for the present, gone from the control of the owner, and the time when she will be restored to him in a state to resume the voyage is uncertain, or unreasonably distant, or the risk and expense are disproportioned to the expected benefit and objects of the voyage. In such a case, the law deems the ship, though having a physical existence, as ceasing to exist for purposes of utility, and therefore subjects her to be treated as lost.* (italics ours) * * *"

The British Marine Insurance Act, 1906, declared the common law in line with those authorities. See sections 60-(1) and (2)* on constructive total loss:

The provisions of Section 60-(2)-(i) of the British Marine Insurance Act, 1906 apply to loss by stranding. Arnould on Marine Insurance, 13th Ed., V-2, Section 1091, page 996, Note 6. In that note the author cites *Hall* v. *Hayman* (1912), 2 K. B. 5, and *British Dominion Gen. Ins. Co.* v. *Duder* (1914), 3 K. B. 835 (reversed on other grounds (C. A. 1915), 2 K. B. 394), with the comment that in both cases it was not disputed that when a vessel is ashore on the rocks, her owners are deprived of the possession of her.

In *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582, the Court affirmed a decision of constructive total loss (SDNY, 40 F. Supp. 404) on the ground that abandonment was justified because the indicated cost of repair would exceed half the repaired value (American rule). The decision below in that case found constructive total loss on either of two grounds; imminent peril of total loss, or because of the probability that the cost of recovery and repair as later shown by the bids would exceed half the insured value. As

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*"60.-(1) Subject to any express provision in the policy, there is a constructive total loss where the subject-matter insured *is reasonably abandoned on account of its actual total loss appearing to be unavoidable,* or because it could not be preserved from actual total loss without an expenditure which would exceed its value when the expenditure has been incurred."

"(2) In particular there is a constructive total loss—

"(i) Where the assured is deprived of the possession of his ship or goods by a peril insured against, and (a) *it is unlikely that he can recover the ship* or goods, as the case may be, or (b) the cost of recovering the ship or goods, as the case may be, would exceed their value when recovered; or

(ii) In the case of damage to a ship, where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired. * * *" (italics ours).

the decision was affirmed on the latter ground, the Court found it unnecessary to deal with the former.

The *Portmar* never was repaired and restored to her former condition. *Plant*, R. 195-196; *Haggett*, R. 208. In this respect the present case differs from other cases in which a ship after abandonment for constructive total loss, and rejection of the abandonment, has been actually recovered and restored to former condition at less than the anticipated expense. But even in such a case the right of abandonment and the claim for constructive total loss is not affected by the result. *Orient Ins. Co.* v. *Adams* (1887), 123 U. S. 67, 74-75; *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. (37 U. S.) 378, 397; 3 Kent Comm. 321; Arnould on Marine Insurance, 13 Ed. Sec. 1051, 1055.

(b) The high probability on April 8, 1942 that the cost of recovering and repairing the Portmar would exceed the insured value.

The rule that the assured may abandon on "high probability" that the expense of recovery and repair will exceed half the value of the repaired vessel (American rule) or the entire value of the repaired vessel (English rule), is historic, both in England and America. 3 *Kent Commentaries*, 321; *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582; *British Marine Ins. Act, 1906*, Sec. 60.

In England, the rule is that the situation under which the abandonment is tendered must be judged as of the date of the writ. *Rickards* v. *Forestal etc. Co.* [1942] A. C. 50, 85; *Pesquerias, etc. S. A.* v. *Beer* (1946) 79 Ll. L. L. R. 417, 432-433.

In America the situation under which an abandonment is tendered must be judged as of the date of the abandonment.

Rhinelander v. *Insurance Co. of Penna.*, (1807) 4 Cranch. 29; *Marshall* v. *Delaware Ins. Co.*, (1808) 4 Cranch. 202; *Bradlie* v. *Maryland Ins. Co.* (1838) 12 Pet. 378, 397-398.

Both tests are usually brought into line by an agreement, as was done here, that the sufficiency of abandonment shall be judged as though a writ had been issued on the date of the abandonment. *Letters*, R. 587-589.

The judgment of the Master on March 3rd, March 10th and April 8th, 1942 was that the estimated total cost of salving, towing, repairing and restoring the vessel to former condition would be "several times the value of the vessel"; that it could not be done at any cost in his estimation that was worth considering; "that those costs, if they could by some miracle be done, they would be so staggering that there was no common sense in it." *Michelson*, R. 350, 355, 357-358. The Chief Officer's judgment was the same. *Bullock*, R. 496, 506-507.

Evidence of subsequent events may be received solely for the purpose of showing what the situation was or what the probabilities were as of the date of abandonment. *Peele* v. *Merchants Ins. Co.* (1822) F. Cas. 10,905; 19 F. Cas. 103; *Bradlie* v. *Maryland Ins. Co.* (1838) 12 Pet. 378, 398.

The first figures which came to the notice of petitioner after the tender of abandonment (R. 736-738) were as follows:

Actual out-of-pocket *costs* of the towage of the *Portmar* from Darwin to Brisbane (R. 223-736)	$ 55,130.00
Estimated cost of repairing and restoring the *Portmar* to classification as before the enemy attacks based on survey report of September 19, 1942 by competent surveyors employed by petitioner at Brisbane, £120,000 Australian equivalent to (R. 648, 737)	390,000.00
Salvage claim asserted by the Commonwealth of Australia, £100,000 Australian equivalent to (R. 150, 737)	325,000.00
Salvage claim asserted by United Proprietary Ltd. and John Protheroe Williams, £50,000 Australian equivalent to (R. 150, 738)	162,500.00
	$932,630.00

The insured value of the *Portmar* stated in the war risk policies was $860,000. The sound condition value of the *Portmar* was $688,000. R. 179. The above figures bore out in every respect the judgment of the Master and Chief Officer made on the spot before they left the *Portmar* at Darwin, and reflected a clear case of constructive total loss on April 8, 1942 because of the high probability that costs of recovery and repair would have exceeded not alone the sound condition value, but also the insured value.

The figures set forth above, however, are by no means complete as to what the total cost of recovering and repairing the vessel would have been. No allowance is made for overhead and profit of a private salvor in towing the vessel from Darwin to Brisbane; nor for wages of the riding crew on the *Portmar;* nor for the commercial

value of all the work that was done at Brisbane by the Quartermaster Corps Detachment under Major Haggett. These and other items, if added, would have swelled the total, and only more strongly confirmed the high probability as of April 8, 1942 that the expense of recovering and repairing the vessel would exceed the insured value. *Royal Exchange Assurance* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32, 39.

The probabilities as of April 8, 1942 as to cost of repair and restoration to former condition and insurance classification are shown by the Brisbane survey of September 19, 1942.

Respondents suggested below that the Brisbane survey report, R. 642-649, was "ex parte". But it was offered and received without objection (*Colloquy,* R. 173) and is therefore competent evidence as showing the probabilities as of April 8, 1942. The cases cited below by respondents, *Abbott* v. *Sebor* (1802), 3 Johns. Cas. (N. Y.) 39, 46, 47 and *Howard* v. *Orient M. Ins. Co.,* (1864) 25 N. Y. Super. 539, 550 hold only that such survey reports may be objectionable under the hearsay rule. No such objection was taken below.

The Sydney survey report, dated February 15, 1943, should not be considered on the point of probabilities as of April 8, 1942.

The surveyors McCowan and Erskine who apparently* represented the underwriters at the Sydney survey, had already inspected the vessel at Brisbane. See *Sydney Survey Report,* R. 650-651. But only one of them, McCowan, signed the "Summary of Expenditure" annexed to the Sydney survey report. *Survey Report,* R. 654. What they found in their examination at Brisbane is not disclosed by the record.

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* Howell and Gibson represented petitioner. *Michelsen,* R. 395 414. Carment represented War Shipping Administration. *Michelson,* R. 415.

The Sydney survey report was also offered and received without objection. But it is entitled to no weight whatever because it was too remote to reflect the probabilities as of the tender of abandonment on April 8, 1942, being made about nine months later, and at a time when it was known (*Colloquy*, R. 204) that it was never to be used for repairs to restore the vessel to class, because no such repairs were to be made; and because a large amount of work had already been done, the true value of which, under the circumstances, was not and could not be properly appraised. R. 738-739. Further, the patch-up job done on the hull (*Colloquy*, R. 209) was accepted in that report as sufficient for purposes of the estimate (*Survey Report*, R. 652) whereas Plant, an experienced steamship operator, said that no owner would ever accept that kind of work. *Plant*, R. 195-196. See also *Haggett*, R. 208. It will also be noted that before the Sydney survey report was issued, the underwriters had already repudiated liability. *Letter*, R. 590-591.

This is not a question of establishing the amount of damages in tort as in the cases relied on by respondents below, *Pennsylvania* v. *Downer*, (2 Cir. 1926) 11 F. 2d 466, *The Westchester*, (2 Cir. 1918) 254 Fed. 576; *The Mason* (2 Cir. 1918) 249 Fed. 718; *The Elmer A. Keeler* (2 Cir. 1912) 194 Fed. 339.

For the reasons above stated the Sydney survey should be disregarded as was one of the bids in *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942) 129 F. 2d 582.

(c) *The constructive total loss clause of the marine policy implied the high probability rule.*

The underwriters argued below, and may contend here, that the constructive total loss clause of the maritime policy form (which for convenience we shall call the "marine CTL

clause"), contains a "formula" which precluded the tender of abandonment and the claim of petitioner for constructive total loss of the *Portmar*.

There appears to be a vague suggestion that the "formula" superseded the high probability rule. The marine CTL clause, reads as follows:

> "No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value. * * *" R. 70-71; 712.

This clause is ambiguous. The words "shall exceed" require interpretation. Those words could be taken to mean "shall actually exceed after the expenditures are made", or they could more sensibly be taken to mean "shall probably exceed".

The former version refutes itself. It would mean that no claim for constructive total loss would lie under the marine CTL clause, until the assured had actually expended more than the insured value of the vessel in order to recover the insured value. In *Reed* v. *Insurance Co.* (1877), 95 U. S. 23, this Court refused to construe language in an insurance policy to mean what would be so unreasonable as to amount to an absurdity.

Clauses similar to the marine CTL clause above quoted have already been construed as contemplating and including the high probability rule. *Orient Ins. Co.* v. *Adams* (1887), 123 U. S. 67; *Royal Exchange Assur.* v. *Graham & Morton Co.* (7 Cir. 1908), 166 Fed. 32; *Chicago S.S. Lines* v. *U. S. Lloyds* (7 Cir. 1926), 12 F. 2d 733; *Klein* v. *Globe & Rutgers Fire Ins. Co.* (*The Tornado*), (WD Pa. 1924, not officially reported) 1924 AMC 452; aff'd 2 F. 2d 137.

It has been held that in other forms of clauses the parties by explicit and unmistakable provisions have made the

right of abandonment depend on the actual result, rather than on probabilities. *Soelberg* v. *Western Ass. Co.* (9 Cir., 1902), 119 Fed. 23. *Wallace* v. *Thames & M. Ins. Co.*, 22 Fed. 66, 70; *Searles* v. *Western A. Co.*, 88 Miss. 260; *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.* (9 Cir. 1916) 236 Fed. 618. There is no comparison between the clauses involved in such cases and the marine CTL clause found in the American Hull Form, 1941, herein.

The District Court quoted and followed the decision in *The Tornado, supra,* R. 752-754 and held that the marine CTL clause contemplates the application of the high probability rule. R. 753.

The marine CTL clause should be read as though it contained the words "shall probably exceed" instead of the words "shall exceed"; or that the words "shall exceed" speak as of the time of abandonment, and thus, looking to the future, contemplate the "probabilities".

(d) *The marine* CTL *clause relates only to a constructive total loss based upon the probable costs of recovery and repair, not to a situation of impossibility of recovery and repair.*

In view of the abundant authority already discussed which recognizes various and distinct grounds for constructive total loss, i.e., among others, imminent peril of total loss, impossibility of recovery and repair, as well as the high probability that the cost of recovery and repair would exceed the repaired value (or the insured value, if the policy, as here, so provides), the present marine CTL clause, by its own terms, should be deemed to relate only to the last category mentioned.

It should not be interpreted as excluding any claim of constructive total loss based on other recognized grounds

Company [1916], 2 A. C. 406, and in the *Isle of Mull, supra,* the Courts were careful to state that *the effect* of the contingency which worked the frustration was not covered by any provision of the contract and thus the question lay within the power of the court to imply a condition. A similar absence of specific provision led to the decision of this Court in *Texas Company* v. *Hogarth Shipping Co.* (1921), 256 U. S. 619, 631.

Nothing could be clearer from the express provisions of the charter than that almost every conceivable contingency of military interference was expressly contemplated and provided for as being within the charter voyage.

The explicit provisions in the present charter as to the consequences of Government intervention bar the implication of inconsistent provisions and a finding of frustration thereon. *Allanwilde Transportation Corporation* v. *Vacuum Oil Co.* (1919), 248 U. S. 377; *Texas Company* v. *Hogarth Shipping Co.* (1921) 256 U. S. 619, 630-631; *F. A. Tamplin S. S. Co. Ltd.* v. *Anglo-Mexican etc. Co. Ltd.* [1916] 2 A. C. 397, 422-423, 426-428; *Larrinaga & Co. Ltd.* v. *Societe Franco-Americaine etc.* (House of Lords, 1923), 39 T. L. R. 316, 320; *Banck* v. *Bromley & Son* (K. B. Div. 1920), 37 T. L. R. 71.

(b) *The conduct of the parties showed that they regarded the round voyage as in effect until February 19, 1942.*

Apart from the provisions of the contract and the authorities above cited, the conduct of the parties themselves was directly contrary to the finding of the Court of Appeals that a frustration of the voyage occurred on January 5, 1942, or that a frustration of the voyage occurred at any time before the loss occurred on February 19, 1942.

It must be remembered that the voyage in question was a round voyage.

Petitioner's and Charterer's intention to complete the round voyage never changed before word was received of the loss and the impossibility of salvage. R. 157. On January 17, 1942 petitioner was informed that U. S. Lines was to be the homeward agent of the U. S. Maritime Commission for a cargo of chrome ore to be loaded on the *Portmar* at New Caledonia for Philadelphia. R. 142-148.

On February 13, 1942 the *Portmar* was temporarily impressed into the service of the United States by requisition of use when the United States, as sovereign, ordered the *Portmar* to load the artillery detachment, guns and equipment, and on February 14, 1942 when she was ordered, in convoy conference on board U. S. S. *Houston*, to sail in convoy toward the Island of Timor. *United States* v. *Russell* (1871), 13 Wall. (U. S.) 623, 627; *Kimball* v. *U. S.* (1869), 5 Ct. Cl. 252; *American Mail Line Ltd.* v. *U. S.* (1944), 101 Ct. Cl. 377.

Notwithstanding that the vessel was temporarily impressed into the public service by the United States as sovereign, the Master's action in following such government orders was not a deviation, breach of orders or neglect of duty because of the specific charter provisions above quoted; and the obligation to pay the hire under Article 2.03 of the charter continued because of the provisions of Articles 2.04(b) and 2.27.

The United States continued payment of the charter hire and has paid the hire up to February 19, 1942 the date on which the vessel became a constructive total loss, in accordance with the provisions of Articles 2.03, 2.04 and 2.27 of the charter. *Charter*, R. 22-24, *Findings of Fact*, R. 742.*

* On June 15, 1944, the hire, theretofore paid to March 1, 1942, was adjusted to February 19, 1942 by a credit on hire due to petitioner on another vessel. *Computation of Hire*, Exhibit 24 (separate volume submitted).

> when she discharged her outward cargo or when she was ordered into service by the military authorities seems immaterial for, whichever it be, they are definitely persuaded that all liability under their policies had terminated prior to the casualty. They therefore ask us to make it clear that they must, with regret, finally decline any liability in connection with this loss."

It is submitted that under the authorities cited *ante*, pp. 38-39, and the special "Held Covered" agreement of February 6, 1942, this Court should hold that the policies were in effect at the time of the loss on February 19, 1942.

The case should end there. Underwriters should not be heard to argue any afterthoughts or urge any ground of defense not stated in their deliberate and considered repudiation letter written under the advice of counsel about a year after the loss occurred. There was ample time for investigation and consideration. Underwriters made their bed and should be made to lie in it. They are not entitled to "mend their hold". They should stand or fall by the position they have taken.

Ohio & M. R. Co. v. *McCarthy* (1877), 96 U. S. 258, 267-268;

Luckenbach S. S. Co. v. *W. R. Grace & Co.* (4 Cir. 1920), 267 Fed. 676;

Grimwood v. *Munson S. S. Line* (2 Cir. 1921), 273 Fed. 166;

Second National Bank v. *Lash Corporation* (3 Cir. 1924), 299 Fed. 371;

Littlejohn v. *Shaw* (1899), 159 N. Y. 188.

This rule has been enforced against insurance companies in the following cases:

Pennsylvania Fire Ins. Co. v. *Hughes* (5 Cir. 1901), 108 Fed. 497;

Brink v. *Hanover Fire Ins. Co.* (1880), 80 N. Y. 108;

Kiernan v. *Dutchess County Mutual Ins. Co.* (1896), 150 N. Y. 190, 196;

The Anthony D. Nichols (SDNY 1931), 49 F. 2d 927;

George etc. Ins. Co. v. *Allen* (1900), 128 Ala. 451.

Therefore it is not open to the underwriters to contend that *even though the policies remained in effect,* petitioner is *precluded* from recovery on the ground that the *Portmar* was "converted into a troop ship on an independent voyage", or was "deliberately exposed to risk of loss," or that the tender of abandonment was defective because the consent of the United States Maritime Commission was not first obtained.

The following argument on the merits is subject to the foregoing reservation.

(a) "Conversion to troopship on independent voyage."

As the Timor sailing was utterly involuntary and under compulsion of sovereign orders, it makes no difference that the Timor sailing was thought to be hazardous, although it was by no means of the character suggested by the underwriters below. The *Portmar* was being sent with troops and guns for the defense of Koepang. R. 722. That was not an "invasion of enemy territory" as repeatedly and baselessly stated by respondents below when the Timor voyage was described as "an attempted army occupation of foreign territory" and as an "invading expedition to capture and occupy the port of Koepang".

It was found as a fact by the District Court that the Island of Timor was then in the hands of the Allies of the United States, and that Japanese troops did not land on Timor until March 1, 1942. R. 722.

It was also found by the District Court that there was put on board the *Portmar* "a motor launch, the *Nevbet*, belonging to the Australian Army." R. 722. That motor launch had been enlarged by the respondents to the status of "troop landing launch"; a "large landing launch", and "a landing barge." These exaggerations disappear in the light of the facts found by the District Court, as stated above.

The port of Koepang had already been attacked by aircraft but by that time vessels in other theatres were plying to and from ports that had been bombed at one time or another. And as for the aspect of an "invading expedition to capture and occupy the port of Koepang", the Court is aware that it takes more than one motor launch to carry out an amphibious "invasion of enemy territory".

A fair examination of the facts reveals the lack of substance in the assertions made by respondents as to the character of the Timor sailing.

Cases in which it was held that *voluntary* deviations occurred, have nothing to do with the question now before the Court. The District Court found as a fact that the Master of the *Portmar* acted throughout under compulsion of soverign authority. R. 718. Therefore petitioner is entitled to recover under the cases cited *ante*, pp. 38-39, especially *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50.

This Court should therefore ignore the following cases and texts relied on by respondents below all of which refer to instances of *voluntary* departure from the insured voyage or *voluntary* increase of the insured risk: *Snyder* v. *Atlantic Mutual Ins. Co.* (1884), 95 N. Y. 196; *Seccomb* v.

Provincial Ins. Co. (1865), 92 Mass. 305; *Arnould on Marine Insurance*, 13th Ed., Sec. 406, p. 400; *Dart on Deviation* quoted from *Knauth on Ocean Bills of Lading*, p. 199; *Andrews* v. *Essex F. & M. Ins. Co.* (1 Cir., 1822), F. Cas. 374; 3 Mason 6; *Herman, Briggs & Co.* v. *Western M. & F. Ins. Co.* (1839), 13 La. 516.

(b) "Deliberate exposure to risk of loss."

In all her passages preceding the Timor sailing, the *Portmar* never saw an enemy. In the Timor expedition the *Portmar* was given a heavy naval escort, the cruiser *Houston* and four Australian naval corvettes. Every possible precaution was taken for her protection.

In going back to January 5, 1942 when the vessel reached Brisbane, and holding that the round voyage ended and the insurance terminated at that point, the Court of Appeals overlooked the fact that in their opening statement under questioning by the District Court, proctors for the underwriters took quite a different position and limited their contention, as to termination of the policies, to the point "when the last of the cargo was out" (at Wyndham) "and she was then ordered to do something else * * *", i.e., the Timor sailing. R. 113.

Respondents below cited *Cleveland* v. *Union Ins. Co.* (1811), 8 Mass. 308, where the loss was due to negligence of the Captain in leaving his papers behind, clearly not applicable here.

They also cited *Haven* v. *Holland* (1 Cir., 1820), F. Cas. 6229, 2 Mason 230. It was a decision in which the cargo underwriters were held liable to the assured. Judge Story's observations that the vessel had no right to cruise at large for prizes merely stated the general rule that the underwriters are relieved if there is a voluntary deviation or

voluntary increase of the risk. It was held, however, that no such deviation or increase occurred if the vessel captured the prize in self-defense.

They cited *Newtown Creek Towing Co.* v. *Aetna Ins. Co.* (1900), 163 N. Y. 114 and *Standard Marine Ins. Co.* v. *Nome Beach Lighterage & Transportation Co.* (9 Cir. 1904), 133 Fed. 636, in both of which the insured vessel was deliberately forced through ice. Here again respondents missed the distinction between voluntary act of the assured, or for which the assured is responsible, and involuntary act under compulsion of sovereign authority.

Finally, they relied on *Williams* v. *New England Mutual Marine Ins. Co.* (1869), 3 Cliff. 244. There a vessel was chartered to the War Department of the United States Government under a charter which constituted a demise, for use as a Government army transport. Respondents suggested that "like the *Portmar*" she was "in charge of her owner's master". That is not correct. The personality of the master remained the same but he became, by the charter, the employee of the United States as operator of the vessel. The Master was directed by the Government, as charterer, to proceed across Hatteras bar for delivery of ordnance stores to the Union troops. It was known that the vessel could not possibly get across the bar in safety, because of her draft. She made the attempt, stranded, and became a total loss. It was agreed that the attempt to cross the bar was unjustifiable, rash and hazardous. In effect, the Government deliberately cast away the vessel of which it was the owner *pro hac vice*. Accordingly the hull underwriters were held discharged from liability to the owner of the vessel.

The *Williams* case has no relation to the present case because here the charter of the *Portmar* was not a demise. Petitioner did not, by any contract or consent, put the Gov-

ernment in a position where it could, as owner *pro hac vice*, give orders to the *Portmar*. The charter contained an express provision to the contrary. *Charter*, Article 2.21, R. 36. Petitioner remained the operator of and in possession of the vessel at all times. *Robins Dry Dock, etc. Co.* v. *Flint, et al.* (1927), 275 U. S. 303; *The Volund* (2 Cir. 1910), 181 Fed. 643. Possession and control as charterer is the distinguishing note of a demise charter. *Leary* v. *United States* (1871), 14 Wall. 607; *United States* v. *Shea* (1894), 152 U. S. 178; *Schnell* v. *United States* (2 Cir. 1948), 166 F. 2d 479. What the master did was done as petitioner's master under compulsion of *sovereign* orders of the United States, a situation entirely different from that found in the *Williams* case, where the orders were given, by virtue of the charter, by the Government as owner *pro hac vice*.

In *Rickards* v. *Forestal etc. Co. Ltd.* [1942] A. C. 50, the goods were indeed "deliberately exposed to risk of loss" by the masters of the vessels. Indeed, in two of the cases they were *actually destroyed* by the masters of the vessels. Yet the underwriters were held liable, because the acts of the masters were under sovereign orders.

On the general subject of "deliberate exposure to risk", it should be noted that the above cases cited by respondents below all require that there be a causal relation between the risk to which the insured property is exposed, and the loss. The facts of this case are clear that the *Portmar* received almost all of the damage for which this suit is brought while lying at anchor in the harbor of Port Darwin where she would have been if she had never sailed for Timor at all, nor received in the meantime any other orders from the United States, as charterer or as sovereign. True, she had field pieces and ammunition in her holds, and troops on board, but she was not attacked by Japanese aircraft on that account; she was attacked, as stated by the District

Court, because she was an American ship lying in the port of Darwin. R. 114. There was no causal connection whatever between the Timor sailing and the damage done to the *Portmar* by the Japanese atttack at Darwin on February 19, 1942.

(c) Consent of the United States Maritime Commission to petitioner's tender of abandonment was either unnecessary, or was waived by the underwriters.

The underwriters declined to accept the abandonment. *Letters,* dated April 8, 1942, R. 587-588. See also the declination of the Excess Insurance Company, Ltd. dated April 9, 1942. *Letter,* R. 589.

Respondents urged below that the "abandonment" was defective because it does not appear that it had the consent of the United States Maritime Commission. But there is not any authority whatever for that proposition. No case has been cited construing Sections 9 and 37 of the Shipping Act, 1916 as applying to the transfer of a shipwreck by an American assured to British underwriters. Those statutes appear to apply to going vessels, not to wrecks.

Respondents referred below to an opinion of the Attorney General dated December 11, 1944, 40 Op. A. G. 342, 1945 AMC 824. It will be seen that the Attorney General's opinion deals only with Section 27 of the Merchant Marine Act, 1920, as amended, which provides that once "sold foreign", no reentry of the vessel into the coastwise trade will be permitted. The Attorney General, after a full review of the authorities, held that the transfer of ownership to the foreign underwriters which occurred by acceptance of the abandonment and payment of the loss in the cases under consideration was a sale within the meaning of Section 27 of the Merchant Marine Act, 1920, as amended. There is

no indication that the Government consented to the abandonments. Yet no suggestion was made by the Attorney General that the abandonments in the cases in question were invalid. Indeed, it was treated as a fact that they were valid; otherwise the vessels had never been "sold foreign".

There is nothing in that opinion of the Attorney General which supports the contention that the abandonment of petitioner's interest in the *Portmar* to the underwriters was invalid for lack of consent of the Maritime Commission. And respondents did not cite any other authority on the subject whatever.

Further, these policies were issued in full sight of the provisions of Sections 9 and 37 of the Shipping Act, 1916. In view of the requirement that abandonment must be promptly made in order to claim a constructive total loss, it could never have been intended that the owner must await the consent of the Maritime Commission before he could make a valid abandonment.

It would seriously affect a vast amount of marine and war risk hull insurance written by English underwriters in the United States, if it were to be announced by this Court that no abandonment may be made for constructive total loss except with Government consent. The whole history of abandonment is that it is an absolute right of the assured. No outside conditions have ever been attached to it and none should ever be.

But even though Government consent were required for the actual transfer of title to the underwriters, the letters of April 8, 1942 of Messrs. Stephens to the underwriters were only a tender or offer of abandonment.

An "abandonment" need not be in any particular form. In *Patapsco Ins. Co.* v. *Southgate*, (1831) 5 Pet. 604, 622

the Supreme Court said that "in whatever mode or form it is made, it ought to be explicit and not left open as matter of inference from some equivocal acts. The assured must yield up to the underwriter all his right, title and interest in the subject insured." It is sufficient if the intent to abandon is clear.

An "offer of abandonment" is sufficient for a claim of constructive total loss. Arnould on Marine Insurance, Sections 1189-1190. See *Marshall* v. *Delaware Ins. Co.* (1808) 4 Cranch. 202, *Peele* v. *Merchants Ins. Co.* (1822) 19 F. Cas. 98, 101; *New York Ins. Co.* v. *Roulet* (1840) 24 Wend. (N. Y.) 505, 513; *Pesquerias etc. S. A.* v. *Beer* (1946), 79 Ll. L. L. R. 417, 433. A "tender" of abandonment was effective in *Jeffcott* v. *Aetna Ins. Co.* (2 Cir. 1942), 129 F. 2d 582, 584.

Where the underwriters decline to accept the abandonment the owner retains the legal title as trustee for the underwriters. *Walden et al.* v. *Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 324; *New York Ins.* v. *Roulet* (1840), 24 Wend. (N. Y.) 505, 513, 517; *Abbott* v. *Broome* (1808), 1 Caines. (N. Y.) 292; *The Boston* (D. Mass. 1846), F. Cas. 1673; *The Packet* (D. Mass. 1823) F. Cas. 10,654; *Scottish Marine Ins. Co.* v. *Turner* (1853), 1 Macq. H. L. Scot. 334, 342; *Ocean Steam Nav. Co. Ltd.* v. *Evans* (C. A. 1934), 40 Com. Cas. 108.

It follows that the offer or tender of abandonment made by petitioner was valid. It offered to the underwriters complete transfer of the interest of petitioner in the vessel. If the underwriters were willing to accept the offer, question might then have arisen whether or not the consent of the Maritime Commission should be obtained.

It is a maxim of the law of contracts that no man is required to do a useless act. Williston on Contracts, Rev.

Ed. V. 3, Section 698-(a); Restatement, Contracts, Sec. 306; *Royal Ins. Co.* v. *Martin* (1904), 192 U. S. 149; *Allegheny Valley Brick Co.* v. *C. W. Raymond Co.* (2 Cir. 1914), 219 Fed. 477, 482. It is unreasonable for the underwriters to contend that the consent of the Maritime Commission should first have been obtained to an offer which the underwriters intended to decline anyway. There was an outright waiver of "abandonment" or of any condition as to Government consent, if any such condition ever existed. *British Marine Insurance Act, 1906*, Sec. 62-(8).

It was suggested by respondents that it is manifestly beyond their power to waive the prerogatives of the Maritime Commission. Even so, it was manifestly within their power to waive abandonment as a matter of ordinary contract law, and under the explicit provisions of Section 62-(8) of the British Marine Insurance Act. By declining the offer of abandonment, they waived any abandonment at all; and thus waived any conditions, whatever they might be, which might attach to an abandonment.

The District Court found (R. 755) that at the time of the rejection of the tender of abandonment, the right and authority of petitioner to transfer title in the event of acceptance was not questioned; and that it was not made in whole or in part the basis of the rejection. Nor did the underwriters raise the point nine months later when they initialed the repudiation letter after "advice of counsel". *Letter*, R. 590-591. It was not even pleaded when the underwriters filed their answer to the libel, three years after the libel was filed. It first formally appeared in the case when the underwriters filed their brief after the close of the trial. If there ever was a lawyer's afterthought, this is it. The District Court disregarded it and it should receive the same treatment in this Court.

CONCLUSION.

THE DECISION HEREIN OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT SHOULD BE REVERSED AND THE DECISION AND DECREE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK HEREIN SHOULD BE REINSTATED.

Dated: New York, December 12, 1952.

Respectfully submitted,

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APPENDIX I.

Pertinent Clauses of the war risk insurance policies, SS. Portmar, Schedule A, Attached to Libel, R. 70-71.

"at and from A UNITED STATES PACIFIC port to port or ports in the PHILIPPINES ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal), Via port or ports any order and for 24 hours after arrival."

* * * * *

"Only against the risks of war, strikes, riots and civil commotions as per American Form attached."

* * * *

"No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovery and repairing the Vessel shall exceed the insured value.

"In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account."

* * * *

"F. C. & S. CLAUSE.

Notwithstanding anything to the contrary contained in the Policy, this insurance is warranted free from any claim for loss, damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations (whether there be a declaration of war or not), piracy, civil war, revolution, rebellion or insurrection, or civil strife arising therefrom.

"If war risks are hereafter insured by endorsement on the Policy, such endorsement shall supersede the above

warranty only to the extent that their terms are inconsistent and only while such war risk endorsement remains in force."

* * *

WAR RISK CLAUSES

"It is agreed that this insurance covers only those risks which would be covered by the attached policy (including the Collision Clause) in the absence of the F. C. & S. warranty contained therein but which are excluded by that warranty."

* * *

"The Adventures and Perils Clause shall be construed as including the risks of piracy, civil war, revolution, rebellion or insurrection or civil strife arising therefrom, floating and/or stationary mines and/or torpedoes whether derelict or not and/or military or naval aircraft and/or other engines of war including missiles from the land, and warlike operations and the enforcement of sanctions by members of the League of Nations, whether before or after declaration of war and whether by a belligerent or otherwise, but excluding arrest, restraint or detainment under customs or quarantine regulations, and similar arrests, restraints or detainments not arising from actual or impeding hostilities or sanctions."

* * *

"Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure caused by arrests, restraints or detainments, of kings, princes or peoples."

* * *

"* * * The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

"Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts

are known to the Assured and/or their managers and an additional premium paid if required."

* * *

"Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2."

Policies, Exhibits 6, 7, and 8, R. 70-71; 598, 711-715.

and to which by reason of its own terms it plainly does not apply. So violent and sweeping an effect should not be given to the marine CTL clause in the absence of any words clearly indicating such an intent of the parties. *Reed* v. *Ins. Co.* (1877), 95 U. S. 23.

Consonant with our contention in that respect, there is a provision in the war risk clauses which limits any exclusions which might be drawn from the wording of the marine CTL clause.

The war risk clauses attached to the present policies contain the following clause, which for convenience we shall call the "war risk CTL clause":

> "* * * The provisions of the attached policy with respect to constructive total loss shall apply only to claims arising from physical damage to the insured vessel."

R. 70-71; 714.

Thus the war risk underwriters emphasized the limited effect of the marine CTL clause, as applied to war risk losses. The clause on which the underwriters rely, as setting up a "formula", therefore, does not apply to petitioner's claim for constructive total loss insofar as that claim is based, as allowed by the District Court, on imminent peril of total loss and impossibility of recovery and repair due to the domination of the area by the Japanese navy and air force.

Such interpretation does not emasculate the marine CTL clause. There remained ample scope for the marine CTL clause as so limited. A vessel might have been damaged by a bomb or torpedo and made her way to safety at an allied or neutral port. If repairs could have been made there, and access to the vessel would not be prevented by an enemy fleet or air force, the sole question would have been as

to the probable cost of repairs. Such a case would be governed by the marine CTL clause properly construed to reflect the high probabilities as to cost of repairs of the physical damage.

The marine CTL clause therefore, by its own terms and as clearly stated by the war risk CTL clause, has nothing to do with certain aspects of constructive total loss as involved in this case, viz. a war risk damage in a remote port with imminent danger of actual total loss and impossibility of recovery and repair at any cost.

The findings and conclusions of the District Court that the *Portmar* was a constructive total loss within the war risk policies should, therefore, be adopted and approved by this Court.

FOURTH POINT.

THE UNDERWRITERS ARE BARRED FROM RAISING ANY GROUND OF DEFENSE OTHER THAN THOSE STATED IN THE REPUDIATION LETTER OF JANUARY 8, 1943.

The repudiation letter written by Thomas Stephens & Sons, Limited, of London to Mather & Company of Philadelphia, dated January 8, 1943 will be found at pages 590-591 of the Record. The District Judge found that the war risk underwriters herein caused Messrs. Stephens to write that letter and that it bore the initials of the leading underwriter and of all the other underwriters. R. 740-742.

The repudiation contained in that letter is based on the following specified grounds:

> "Whether it be held that Underwriters' liability terminated on arrival of the vessel in Australia or

rata for any portion thereof. The Charterer shall also pay the Owner at the rate of $1.50 per day per person for victualling of any personnel (in addition to the Vessel's normal complement) required to be aboard the vessel by written request of the Charterer or by any other agency or department of the Government, and $1.00 per day per person for victualling any extra complement of the vessel necessitated by such personnel being aboard. * * *

* * *

ARTICLE 1.03. The valuation of the Vessel for insurance purposes as provided in ARTICLE 2.17 shall be $860,000.

* * *

PART II.

* * *

ARTICLE 2.03. The Charterer shall (except as otherwise specifically provided herein) pay hire for the use of the Vessel at the rate stipulated in ARTICLE 1.02, beginning with the time of her delivery, and continuing until the time of her redelivery in like good order and condition, ordinary wear and tear excepted, to the owner at the port of redelivery specified in ARTICLE 1.04, or if the Vessel shall be lost, until the time of her loss, if known, otherwise to the time last heard from; or in the case of a constructive total loss, to the time of the casualty resulting in such constructive total loss; * * *

"ARTICLE 2.04. Payment of hire hereunder shall cease to the extent that time is lost to the Charterer:

(a) if the Vessel is prevented, in whole or in part, from working for twenty-four consecutive hours because of a deficiency of men or stores, breakdown of machinery, collision, stranding, or fire or other accident or damage to the Vessel; or

(b) because of breach of orders or neglect of duty by the Master, officers or crew, * * *"

Provided, however, That except to the extent that loss of time is caused by the failure of the Owner to exercise due diligence to keep the Vessel working and to prevent loss of time, payment of hire shall not cease because of:

"(ii) the happening of any event listed in (a) above caused by the fault of the Charterer or caused or contributed to by war or warlike acts, sailing in convoy, operating (contrary to a peace-time custom) without lights or pilots, navigating or mooring in (contrary to peace-time custom) unlighted, unbuoyed, or overcrowded waters, excessive usage (because of war or warlike conditions) of machinery or equipment, navigating (contrary to peace-time custom) under the direction of naval, military, Coast Guard, no other governmental authorities, or discharging alongside or into ships; or"

* * *

"ARTICLE 2.15.

* * *

(v) *War Clauses*

* * *

"The carrier, master and ship shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions. Delivery or other disposition of the goods in accordance with such orders or directions shall be a fulfillment of the contract voyage. * * *"

"ARTICLE 2.16. * * * And neither the Vessel, her master or Owner, nor the Charterer, shall unless

otherwise in this Charter expressly provided, be responsible for any loss or damage or delay or failure in performing hereunder arising or resulting from: act of God, act of war; act of public enemies, * * * arrest or restraint of princes, rulers or people, * * * no exemption afforded to the Charterer under this Article shall diminish its obligations for hire under the other provisions of this Charter."

"ARTICLE 2.21. Nothing herein stated is to be construed as a demise of the Vessel to the Charterer."

"ARTICLE 2.27. The Master and the Vessel shall have liberty to comply with any orders or directions as to loading, departure, arrival, routes, ports of call, stoppages, discharge, destination, delivery or otherwise howsoever given by the government of any nation or department thereof or any person acting or purporting to act with the authority of such government or of any department thereof, or by any committee or person having, under the terms of the war risk insurance on the ship, the right to give such orders or directions, and if by reason of or in compliance with any such orders or directions anything is done or is not done, such shall not be deemed a deviation or breach of orders or neglect of duty by the Master or the Vessel; * * *"

APPENDIX III.

Historical Facts

1. Prior to November 26, 1941, negotiations between the Secretary of State, Hon. Cordell Hull, and the Japanese envoys Admiral Kichisaburo Nomura and M. Saburo Kurusu, approached a critical stage. The daily press carried news items of increasing tension in the Pacific situation. The possibility of war with Japan was openly recognized in American and British official circles. The British Prime Minister had discussed the extent of British naval participation in the Pacific in the event of war with Japan. It was generally expected that danger might develop at any moment in the Far East. R. 710.

Morison, History of United States Naval Operations in World War II, Vol. III "The Rising Sun in the Pacific" (1950) pp. 64-79;
New York Times, November 23rd and 24th, 1941.

2. On December 7, 1941, the Japanese attacked Pearl Harbor. R. 716.

1943 World Almanac, p. 52.

3. On December 8, 1941 the United States and Great Britain declared war against the Japanese Empire. R. 717.

1943 World Almanac, p. 53.

4. On December , 1941 HMS. *Prince of Wales* and HMS. *Repulse* were destroyed by Japanese aircraft off the east coast of the Malay Peninsula. The loss of these two ships together with United States losses at Pearl Harbor gave the Japanese full battle fleet command of the Pacific. The Japanese then had naval superiority which enabled them to transport troops to almost any desired point,

possess themselves of it, and establish it for an air-naval fueling base. R. 717.

Churchill, "The Grand Alliance" (1950);
1943 World Almanac, p. 53.

5. On February 23, 1942 the Prime Minister of Australia refused to consent to the diversion to the defense of Burma of a homeward-bound Australian division. R. 728.

Churchill, "The Second World War", Vol. IV, Book 1, inst. 4 N. Y. Times, October 13, 1950.

6. The disastrous series of defeats suffered by the Allies (ABDA) in Malaya, both on land and sea, led to the fall of Singapore on February 15, 1942. This was followed by the Battle of the Java Sea and Sunda Strait with the loss of USS. *Houston* and other Allied naval vessels, and the loss of the aircraft carrier USS. *Langley,* destroyed by Japanese aircraft between Australia and Java, February 27-March 1, 1942. R. 728-729.

Morison, History of United States Naval Operations in World War II—Vol. III "The Rising Sun in the Pacific", (1950) pp. 292-380;
1943 World Almanac: pp. 61-64;
Churchill, The Second World War, Vol. IV, Book 1, inst. 4 N. Y. Times, Oct. 13, 1950.

7. On March 1, 1942 the Japanese invaded the Island of Java and occupied the western part of the Island of Timor.

Before that date Timor was in the hands of Allies of the United States. R. 722, 729.

1943 World Almanac, p. 64.

8. The battle of the Coral Sea occurred on May 4-9, 1942. R. 736.

1943 World Almanac, p. 73.

APPENDIX II.

Pertinent Clauses of the time charter of SS. Portmar, Exhibit A, Attached to Libel, R. 18-38.

Contract MCc-1915

TIME CHARTER.

CHARTER PARTY made as of November 21, 1941, between CALMAR STEAMSHIP CORPORATION, a Delaware corporation, OWNER of the good steel steamship *Portmar* (herein called the "Vessel") with hull, machinery and equipment in a thoroughly efficient state, of about 428,116 cubic feet bale capacity and about 8600 tons (of 2240 pounds) deadweight capacity for cargo, bunkers, fresh water and stores on a mean draft of 24 feet and 0 inches on Lloyds Summer freeboard, inclusive of permanent bunkers (including deep tanks used for bunkers), which are of the capacity of about 11,992 barrels of fuel oil, and capable, when fully laden, of maintaining under good weather conditions a speed of about 9½ knots on a consumption of about 164 barrels best grade fuel oil (Bunker "C" or equivalent) per 24 hours, with gear for all derricks capable of handling lifts up to three tons, the speed and consumption being believed by the Owner to be correct, but not guaranteed, and the UNITED STATES MARITIME COMMISSION, CHARTERER:

* * *

PART I.

ARTICLE 1.01. The Owner agrees to let, and the Charterer agrees to hire the Vessel, from time of delivery, for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports.

ARTICLE 1.02. The rate of hire payable as provided in ARTICLE 2.03 shall be $4.70 per ton of the Vessel's deadweight capacity as hereinbefore stated per month or pro

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NO. 303

In the Supreme Court of the United States

OCTOBER TERM, 1952

CALMAR STEAMSHIP CORPORATION, *Petitioner*

v.

SYDNEY KEITH SCOTT, One of the Lloyds Underwriters, and

EDINBURGH ASSURANCE CO., LTD. et al., Insurance Companies Members of the Institute of London Underwriters, and EXCESS INSURANCE COMPANY LIMITED, OF LONDON, A British Corporation.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This petition for certiorari and the petition in *Calmar Steamship Corporation* v. *United States of America*, October Term, 1952, No. 262, in which the Government does not oppose certiorari, arise

out of the same occurrence. Although the cases were not consolidated, they were tried together and decided in a single opinion by the District Court. 103 F. Supp. 243, R. 700-756. The District Court directed that the appeals proceed on a single printed record. The Court of Appeals decided the appeals in a single opinion (R. 792-804) reported at 197 F. 2d 795.

The United States is financially interested in the outcome since, even in petitioner's view, the liabilities of the war risk insurance underwriters (respondents herein) for the loss of the Portmar in Darwin Harbor, Australia, in February 1942, on the one hand, and of the United States as charterer under the voyage charter (respondent in No. 262), on the other, are essentially in the alternative (Pet. 2). In addition, the Government paid for the insurance (R. 35, 744), and one of petitioner's claims against the Government is for failure to insure (R. 15-16). Therefore, in spite of the fact that it was not a party, the United States is concerned in having as complete and consistent a disposition of the litigation as jurisdictional limitations will permit.

The petition presents the important question of how to harmonize and give effect to all the language of standard war risk insurance coverage provisions (cf. *Standard Oil Co.* v. *United States*, 340 U.S. 54) with respect to war risks likely to be accompanied by frustration of voyage by gov-

ernmental restraints upon American vessels. The court below, reversing the District Court, held that the war risk insurance policies (although they covered risks of war, the consequences of hostilities or warlike operations, and losses caused by gunfire, bombs, or other implements of war) nevertheless were not in force and did not cover losses actually sustained from war risks after the voyage was frustrated by military control.[1] Whether war risk insurance policies should be construed to survive frustration; whether the policies are made nugatory (cf. *Rickards* v. *Forestal Land etc., Co., Ltd.* [1942] A. C. 50, 88) by the Court of Appeals' construction, as petitioner contends; or whether the policies as construed by the court below retain significant areas of insurance coverage and protection, are recurrent questions of maritime law with respect to war risk insurance, of concern to shipowners, underwriters, and the Government, which have not been decided by this Court.

For these reasons, the United States, while not concurring in the petitioner's reasoning, nor joining in all the arguments it advances, nor conceding that the Government automatically becomes liable in the event that the insurance underwriters

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[1] It said (197 F. 2d at 801):

> "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer."

are not, agrees that the petition raises important questions of federal law appropriate for decision by this Court.

Respectfully submitted,

ROBERT L. STERN,
Acting Solicitor General

SEPTEMBER 1952.

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> authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses otherwise covered by this policy which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention. [R. 50-51, 70, 714-15.]

In addition, the policies stated that the vessel would be (Rider F-300, R. 70, 714):

> Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required.

that

> The premium paid for this insurance shall not be subject to any return for layups or otherwise.

and that (R. 70, 712-713):

> No recovery for a Constructive Total Loss shall be had hereunder unless the expense of recovering and repairing the Vessel shall exceed the insured value.

> In ascertaining whether the Vessel is a Constructive Total Loss the insured value shall be taken as the repaired value, and nothing in respect of the damaged or break-up value of the Vessel or wreck shall be taken into account.

Petitioner took out this insurance (R. 709) paying the 1½% premium stipulated by respondents and advising the United States before the vessel's departure of the kind and amount of insurance procured (R. 598-601).

The *Portmar* left San Francisco on November 28, 1941, bound for Manila with a cargo of high octane gasoline and sundry other military supplies (R. 716). On December 7, 1941, while proceeding, in accordance with routing orders issued by the United States Naval Control Officer at San Francisco, 600 miles southeast of the Hawaiian Islands, she received a radio report of the Japanese attack on Pearl Harbor (R. 715-16). In order to avert serious danger of enemy attack, the master, a veteran of over thirty years experience, changed his course and proceeded south pending further naval orders (R. 273, 717). On December 11, radio instructions were received from the Naval Commandant at San Francisco to proceed to Suva, Fiji Islands, to obtain further directions from British naval authorities (R. 717). The *Portmar* was then 600 miles south of the route prescribed in her original orders. On arrival at Suva on December 20, she was directed to proceed to Sydney, Australia, by the British Naval Control Officer in the presence

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of New York (R. 700-756) are reported at 103 F. Supp. 243. The opinion of the United States

Court of Appeals for the Second Circuit (R. 792-802) is reported at 197 F. 2d 795.

JURISDICTION

The judgment of the United States Court of Appeals was entered on May 12, 1952 (R. 805). A petition for a rehearing was denied on June 6, 1952 (R. 820). The petition for a writ of certiorari was filed on August 28, 1952, and granted on October 20, 1952 (R. 822). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether war risk insurance on a vessel time-chartered to the United States for a round voyage to Australia necessarily terminated on January 5, 1942, when (in the view of the Court of Appeals) a governmental seizure occurred, on the analogy that a charter party for the same voyage would have terminated on that day.

THE INTEREST OF THE UNITED STATES

This case presents an important question concerning the scope of the protection afforded by war risk insurance policies when the insured voyage is interrupted by a governmental restraint in connection with war operations. The interest of the United States stems partly from the fact that it is itself a war risk and marine underwriter [1] and the

[1] By a 1940 amendment to the Merchant Marine Act of 1936, 49 Stat. 1985, the Maritime Commission was authorized to provide, in certain instances, marine insurance and reinsurance against loss or damage by the risks of war and reinsurance against loss or damage by marine risks. Act of June

determination by this Court of the issues involved will bear on the Government's liability as insurer on other occasions. Also, as noted in the memorandum submitted by the Government as *amicus curiae* in connection with the petition for a writ of certiorari, the interest of the United States in the outcome of this litigation is partly financial (memorandum, p. 2), for the policies were written to cover a vessel that had been chartered by the United States, the United States paid for the premiums, and the vessel's owner, petitioner herein, has asserted in a separate action brought against the United States that the latter is liable on the claimed loss if the insurance issued by respondents was not in effect. See *Calmar Steamship Corp.* v. *United States*, October Term, 1952, No. 262. Finally, since dispo-

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29, 1940, 54 Stat. 689, amended by Act of April 11, 1942, 56 Stat. 214, 46 U.S.C. 1128. The 1940 amendment was repealed by Act of July 25, 1947, 61 Stat. 449, on the ground that authority to issue such insurance was no longer needed. See the Brief for the United States in *De La Rama Steamship Company Inc.* v. *United States*, No. 368, this Term, pp. 19-20, 21. After the outbreak of hostilities in Korea, Congress added a new title to the Merchant Marine Act which, *inter alia*, permits the Secretary of Commerce "with the approval of the President, and after such consultation with interested agencies of the Government as the President may require, [to] provide insurance and reinsurance against loss or damage by war risks in the manner and to the extent provided in this title, whenever it appears to the Secretary that such insurance adequate for the needs of the water-borne commerce of the United States cannot be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States." Act of September 7, 1950, § 1202 (a), 64 Stat. 773, 46 U.S.C., Supp. V, 1282. This authority will expire on September 7, 1955. § 1214, 64 Stat. 777, 46 U.S.C., Supp. V, 1294. And see also Act of June 6, 1941, § 3, 55 Stat. 243, as amended, 56 Stat. 370, 57 Stat. 51, 50 U.S.C. 1273.

sition of this suit may affect the attitude of shipowners in the face of governmental restraints in times of crisis, the United States is interested in encouraging their full, ungrudging cooperation and in minimizing parleys that tend to impede needed emergency action. In this connection, it is opposed to any rule tending to impel the American owner, whether as charterer or otherwise, to be unwilling to accept freely governmental restraints on shipping in periods of grave national emergencies.

STATEMENT

On November 21, 1941, petitioner entered into a voyage charter with the United States "for trading for one round voyage from United States Pacific port or ports to a port or ports in the Philippine Islands, returning to U. S. North Atlantic port or ports" (R. 19); the vessel was petitioner's *Portmar*, which had a cargo capacity of 428,116 cubic feet with a deadweight capacity of 8600 tons (R. 589). The charter provided in Article 2.17 that either the United States or petitioner at the expense of the United States was to provide war risk insurance payable to petitioner in the amount of the vessel's valuation ($860,000). This insurance was to be under full form of American Institute of Marine Underwriters war risk policies. (R. 35.)

On November 26 and 27, 1941, respondent British underwriters initialed war risk binders covering the *Portmar* on the charter voyage in the amount of $860,000 (R. 709-710). On January 19, 1942, respondents issued three policies on the "American

Institute TIME (HULLS) (July 1, 1941)" form with war risk clauses and riders attached. This form had been published by the American Institute of Marine Underwriters after its adoption and promulgation by the American Marine Insurance Syndicate. The insured voyage was described in each policy as being "at and from a UNITED STATES PACIFIC port to port or ports in the PHILIPPINE ISLANDS, whilst there and return to UNITED STATES PACIFIC port or UNITED STATES ATLANTIC port (Via Panama Canal) Via port or ports in any order and for twenty-four hours after arrival." (R. 70, 710-11) By the war risk endorsement to the basic marine hull form, the policies were made to cover:

> * * * damage or expense caused by or resulting from capture, seizure, arrest, restraint or detainment, or the consequences thereof or of any attempt thereat, or any taking of the Vessel, by requisition or otherwise, whether in time of peace or war and whether lawful or otherwise; also from all consequences of hostilities or warlike operations * * * (R. 70)

and specifically "the risks of military and naval aircraft" (R. 70, 714). A rider to the policies ("B. C. 2") provided that:

> Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the

trend was more evident. A private citizen might well have assumed that a large cargo vessel would be sent back to the United States shortly. Petitioner was explicitly informed in mid-January that within a month the Maritime Commission intended to return the *Portmar*.

The Court of Appeals, in 1952, drew its own inferences as to the nature of the restraint imposed upon the *Portmar*. But on January 5, 1942, other inferences were at least equally possible and consistent with the facts. In these circumstances, the District Court should have determined the nature of the restraint as it was objectively, and as it must have appeared to the insured. The finding is of the type that should ordinarily be left to the trial court. Apparently, neither petitioner nor respondent adduced its proof on the basis of the principles subsequently laid down by the Court of Appeals.

Nor did the Court of Appeals seek to determine what petitioners' expectations *should* have been at Brisbane on January 5, 1942. If the insurance ended on January 5, respondent underwriters received a substantial windfall in that, after taking a premium of $13,000 for assuming certain risks over a period extending to April 1942, they escaped exposure to risks for the three months of that period coinciding with the most acute stage of the insured's needs for war risk insurance. When the nature of war risk insurance is examined, it is difficult to justify disregard of the legitimate expectations of the insured and its need to maintain

an unbroken sequence of coverage. If war risk insurance is to be more than a name, the insured should have a reasonable time to appraise what has taken place, to recognize its implications, and then to obtain the protection the new situation requires. The brunt of uncertainty should rest on the underwriters, who in this case issued the war risk insurance at the end of November 1941 when the need for protection against the consequences of war was substantially increased. As pointed out above (*supra*, pp. 19-20), the underwriters may properly be held for a longer period after the initiation of a governmental restraint than may the owner under a charter.

From the standpoint of the owner of the *Portmar*, its legitimate expectations were that insurance protection continued. So long as it was uncertain that the interruption, if any, was more than temporary, the insurance should protect against loss as a result of war risk. Conceding that (in the absence of provision in the policy to the contrary) if a vessel covered by a voyage policy is requisitioned for a period beyond the expected duration of the voyage the owner has to reinsure, we submit that the insured must be on notice at the time that such a requisition has occurred and must have a reasonable time to obtain the new coverage it needs. In holding that the insurance terminated on January 5, 1942, the Court of Appeals failed, we believe, to consider the events as they were unfolded to the master and his owner and the unresolved situation that prevailed in January and February, 1942. It

of an American naval officer who informed the master that the order was issued with the "knowledge and understanding of the American authorities." (R. 280, 717-18) The vessel sailed from Suva on December 22 and arrived at Sydney on December 30 (R. 718). As ordered, the master reported to the Australian Naval Control Officer who instructed him to continue on to Brisbane, Australia (R. 718). Prior to departure from Sydney on January 2, 1942, the master was in constant contact with the local United States Consul who informed him that he should cooperate and follow the Australian commands (R. 284, 719).

On January 5, 1942, the *Portmar* entered the harbor at Brisbane where, under the direction of American military authorities, her cargo was discharged, sorted, and in part reloaded along with material that had been brought in on other American ships (R. 285-86, 719). The American Army officers then instructed the vessel to proceed to Darwin with her cargo under routing orders received from the Australian Naval Control Officer (R. 287, 719). After obtaining further assurance from the Brisbane American Consul that he was to obey Australian orders, the master departed on January 9 (R. 719). When he reached the Torres Strait en route to Darwin he was signalled to enter the harbor at Thursday Island and was thereupon placed in a convoy with two other American vessels. The convoy, escorted by two Australian corvettes, reached Darwin on January 19. (R. 719.)

Up to that date petitioner had received no word

whatsoever as to the vessel's whereabouts. Naval officials in the United States had been able to furnish no information other than that the vessel was "safely afloat". (R. 141.) The master had endeavored to send cables to petitioner from Suva, Sydney, and Brisbane but he was informed on each occasion that security restrictions prevented communication (R. 718-19). In addition, while at Suva, he wrote two letters to petitioner, in one of which he detailed the situation as of that time. Neither of these letters, left with a naval officer to be mailed, ever reached their destination. (R. 718.) On January 19, however, petitioner was notified by an agent of the Maritime Commission that the vessel was in Australia but would load chrome ore at New Caledonia the latter part of February for discharge at Philadelphia in April (R. 142-43, 720). Three days later, confirmation that the vessel was in Australia was sent to petitioner in New York by its San Francisco office (R. 720). Assuming that the vessel had been diverted by government orders, petitioner cabled respondents to this effect on January 24, requesting that the vessel be held covered pending further advices. Respondents agreed to comply with this request and so notified petitioner by letter of February 6. (R. 720.)

In the meantime, the *Portmar* lay at anchor in Darwin Harbor from January 19 to January 31 awaiting a discharge berth. She docked on the latter date and her cargo was unloaded, with the exception of 2000 drums of gasoline, under the direction of an American Army colonel. (R. 290, 720-

21.) The master again attempted unsuccessfully to cable petitioner (R. 721). On February 4, the Australian authorities ordered the *Portmar* to transport the gasoline to Wyndham in Western Australia and then to return to Darwin (R. 721). The master raised an objection with the American Naval observer to accepting orders given by foreign naval authorities and stated his opinion that the smaller British and Australian ships in the harbor were better fitted for the voyage to Wyndham. The observer answered that co-operation was necessary and that the *Portmar* was the most available vessel for the journey. (R. 290-91, 721.) The *Portmar* sailed from Darwin on February 4 in a convoy escorted by a corvette, arriving at Wyndham on February 8 and discharging the gasoline. The vessel returned to Darwin two days later, anchoring on February 12, 1942. (R. 721.)

On February 13, the American colonel supervising cargo operations informed the master that the *Portmar* had been selected to carry United States troops and equipment from Darwin to Koepang on Timor Island. The vessel was loaded with field guns, ammunition, and between 300 and 400 officers and enlisted men (R. 296, 721-2), and, on February 15, left Darwin with three other merchant ships in a convoy headed by an American cruiser, routing orders having been issued by an Australian control officer at a pre-departure conference (R. 722). The Island of Timor was still in Allied possession but Japanese forces had control of the surrounding waters and maintained aerial

supremacy (R. 722). While crossing the Timor Sea on the first day out, the convoy was attacked by enemy aircraft but continued on its route (R. 722-23). The following morning, February 16, another attack occurred and, while not suffering a direct hit, the *Portmar* was severely shaken and somewhat damaged. Shortly thereafter, the convoy commander signalled that the vessels were to turn back. The *Portmar* anchored in the Darwin harbor on February 18, awaiting her turn at a discharging berth. (R. 723.)

On the morning of February 19, Japanese aircraft attacked Darwin harbor. The *Portmar* suffered severe damage from continuous machine-gun and aerial cannon fire. She began taking in water, her pumps became clogged, her navigating equipment was destroyed, and her deck-house wrecked. (R. 312-29, 724.) The master, realizing that the vessel might sink if left in the harbor, ran her aground (R. 329-31). She was taking in water rapidly through shrapnel perforations below the water line and was listing badly. The chief engineer reported that he was unable to control the entry of water and feared the boilers might blow up as the listing increased. (R. 725-26.) The master then directed the abandonment of ship by the crew but remained on board himself for most of the following two days (R. 726). On February 21, an American Army officer accompanied by a professional salvor boarded the *Portmar* and discussed the prospect of salvaging the badly needed field guns that were stowed in the hold. No reference

was made to the salvaging of the vessel itself. (R. 727.) Thereafter the master went ashore and unsuccessfully endeavored once more to contact petitioner (R. 727-28).

Between February 24 and March 2, 1942, the master was aboard the *Portmar* at frequent intervals. No work was done or could have been done on the vessel, however, since labor was unavailable, continuous attacks by the enemy made work during the day impracticable (R. 346), and the *Portmar's* crew members were themselves employed at night in the unloading of cargo on another vessel (R. 729). The master when he went on the *Portmar* for the last time in Darwin on March 3, 1942, was of the opinion that it was impossible to salve the ship because of the lack of facilities at Darwin for raising, towing, or repairing her; the complete domination of Japanese forces in the surrounding area; and the poor condition of the vessel (R. 730). He and the chief officer believed that the cost of recovering and repairing the vessel, if it could at some future time be accomplished, would exceed the valuation of the ship (R. 730, 731).

Under military orders the master left Darwin with his crew for Melbourne on March 10, 1942 (R. 732). Upon arrival he noted a protest before the American Consul and a notary public, and retained a firm of solicitors to represent petitioner's interests. He remained in Australia himself after the rest of the ship's company had been repatriated to the United States in April 1942. (R. 733.)

In the meantime, in the course of salvage opera-

tions undertaken in Darwin to remove the artillery from the *Portmar's* holds, the salvor came to the conclusion that the vessel might be floated and was directed by the American Army officer to attempt to do so (R. 733). After a temporary patching of shrapnel holes, the vessel was pumped out and on April 5 floated. The master learned of this development in Melbourne on April 13. (R. 733.)

Under direction of the United States Army, the *Portmar* was towed through enemy-infested waters to Brisbane by the salvor in June and July 1942 (R. 736). This towing operation, as well as the prior salvaging of the vessel, was accomplished by the use of Australian government facilities. The desperate war situation would have made it impossible for a private commercial concern to obtain the use of comparable equipment. The actual cost of the services and equipment furnished in raising and towing the *Portmar* was $55,130. The reasonable value of the services was much greater. (R. 736.)[2]

At Brisbane the vessel was surveyed and the cost of repairing her in such a manner as would regain her former classification was estimated at approximately $390,000. Such repairs could not have been made by other than military or government agencies at the time. (R. 737.) Therefore, the United States Army, utilizing its own enlisted personnel

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[2] The Australian government and the salvor subsequently made demand for $325,000 and $162,000, respectively, as an award for the salvage services rendered the Portmar. The High Court of Australia dismissed the government claim but awarded the latter a total of approximately $20,000. Petitioner satisfied this judgment in 1944 (R. 737-40).

and pieces of scrap metal available in the area, undertook to make temporary repairs which, while extensive, were not undertaken to restore the vessel to its former condition but merely to permit operation in Australian waters during the war (R. 738).

On November 17, 1942, title and possession of the *Portmar* were requisitioned by the War Shipping Administration and she was taken to Sydney (R. 623, 738). There additional repairs were made and a further survey of the vessel was undertaken at which the owner, the war risk underwriters, and the United States were represented (R. 738). On February 15, 1943, the surveyors issued a joint report which stated that the cost of restoration to pre-war condition would be roughly $96,000. This figure did not purport to measure the extent of the damage suffered by the *Portmar* since a large amount of repair work had already been done at Brisbane. (R. 739.)

While these events were transpiring in Australia, the following occurred in the United States. On February 18, 1942, the Maritime Commission notified petitioner by letter that the *Portmar* was in Darwin (R. 145-6). Petitioner received a telegram from the War Shipping Administration on February 23 advising that the *Portmar* was reported to have been badly damaged in an air-raid on Darwin but that the extent of damage was unknown (R. 603). On March 24, a cable from the master in Melbourne advised that in his opinion the extensive damage to the ship made salvage impossible (R. 604). On March 30, the Melbourne so-

licitors cabled petitioner recommending a tender of abandonment on the basis of the master's report that the vessel was a constructive total loss (R. 605). On April 2, a second cable from the master was received outlining the vessel's journeys after December 7 (R. 603).[3] On April 4, 1942, petitioner received a letter from the Maritime Commission stating that a dispatch from the Observer at Melbourne had been received reading "Darwin advises *Portmar* aground amidships to stern perforated port side by shrapnel. Does not believe can be salvaged as cargo carrier but might be as hulk or floating store" (R. 606). On April 7, 1942, petitioner instructed its insurance brokers to tender abandonment of its interest in the *Portmar* to respondents. Abandonment was tendered on April 8 through the London correspondent (R. 587). The underwriters rejected the tender of abandonment but agreed to place petitioner in the same position as if a writ had already been issued in the action (R. 588-89).[4] See *Rickards* v. *Forestal Land, Timber & Railways Co.*, [1942] A.C. 50, 84-85.

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[3] This cable was in response to a cable sent by petitioner to the master on March 27, requesting the vessel's itinerary after leaving the United States (R. 605). Prior to its receipt, petitioner knew only that the vessel had gone to Darwin. Petitioner first obtained the details of the "restraint" in early May 1942, when the *Portmar* crew arrived at San Francisco (R. 157).

[4] It has been held in England that, although a constructive total loss has occurred and due notice of abandonment given, the insured cannot recover for a total loss if before the action is commenced the subject matter of the insurance is restored to such an extent that possession might be regained. *Naylor* v. *Taylor* (1829) 9 B & C 718; *Brotherston* v. *Barber* (1816) 5 M & S 418; *Hamilton* v. *Mendes* (1761) 2 Burr. 1198. It

On January 8, 1943, petitioner's brokers received a letter from their London correspondent to the effect that respondents declined any liability in connection with the loss of the *Portmar* because in their opinion their liability on the policies terminated upon the arrival of the vessel in Australia and the subsequent voyages represented "an entirely fresh series of adventures which can by no stretch of imagination be considered as having anything whatever to do with the venture originally insured or with the extension of the insurance to cover the diversion of the vessel to Australia" (R. 590).

On February 11, 1944, petitioner filed a libel against the United States (R. 5-18) alleging *inter alia* that, if the policies issued by respondents did not cover the claimed loss, the United States was liable as an insurer under Article 2.17 of the charter for the damages resulting from the Darwin attack (R. 16). On November 10, 1944, petitioner filed a libel against respondents in the same court seeking recovery of the face amount of the policies, in addition to $42,762.12 which represented "sue and labor" expenditures purportedly incurred in the interest of the vessel after February 19, 1942 (R. 45-69). The actions were consolidated for the purpose of trial.

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is uncertain whether this principle is still the law in that country [cf. Marine Insurance Act, 1906, 6 Edw. 7, c. 41 § 61; *Polurrian Steamship Co., Ltd.* v. *Young* (1915) 1 K. B. 922] but irrespective of its present vitality, respondents' concession fixed petitioner's right of recovery as of the time when the notice of abandonment was submitted by regarding the action as having been commenced at such time.

The District Court held that the claimed loss was covered by the policies and that the vessel was a "constructive total loss." (R. 700-756) Judgment was awarded against respondents for approximately $895,000 plus interest (R. 756). The District Court further held that while it had jurisdiction over the libel against the United States by virtue of Sections 1 and 2 of the Suits in Admiralty Act, 46 U.S.C. 741-742 (R. 742), the *Portmar* did not sustain any loss or damages from a cause which would render the United States liable under the charter (R. 756).

The Court of Appeals reversed, holding (a) that the insurance coverage issued by respondents on the *Portmar* terminated on January 5, 1942, when the vessel was seized at Brisbane, and (b) that the District Court was without jurisdiction under the Suits in Admiralty Act over the libel against the United States (R. 792-804). The instant petitioner seeks review of the first determination.[5]

SUMMARY OF ARGUMENT

The Court of Appeals assumed that the *Free of British Capture* rider (*supra*, pp. 5-6) in the war risk policies, on which petitioner had relied, along with the special "held covered" agreement of February 6, 1942 (*supra*, p. 9), applied only after it had first been established that the policies were in force at the time of the claimed loss. It therefore did

[5] The Court also granted a writ of certiorari on October 20, 1952, to review the latter determination (R. 822). *Calmar Steamship Corp.* v. *United States*, October Term, 1952, No 262.

not consider the meaning of the rider. In its view, the insurance coverage ended on January 5, 1942, because there was then a departure working a frustration of the underlying venture, arising out of a restraint or requisition which appeared likely to outlast the expected duration of the charter period. We suggest, however, that on the principles applicable to departures from the course of a voyage, the war risk protection had not ended by February 19, 1942, the date of the claimed loss.

A. In every contract of marine insurance covering a vessel on a particular voyage, there is an implied warranty that she will strictly maintain the regular course of that voyage. But this implied warranty is not breached when the vessel is compelled to deviate from its course or to abandon the original *terminus ad quem* because of considerations of safety or other circumstances beyond the control of the master or owner. Under these principles, the *Portmar* neither deviated nor changed its voyage, as those terms are understood in marine insurance; the master acted in compliance with lawful commands that he was legally bound to obey, and therefore there was no breach of the warranty that the vessel would maintain her scheduled course.

Of course, regard must be given to the grounds and circumstances of the previous decisions holding that an involuntary departure did not terminate a particular policy, which remained in force at the time of the claimed loss. In general, the in-

surance has been found effective where the restraint operated as an immediate peril from the standpoint of the insured and where the peril was one of which the underwriters should have been cognizant. In these circumstances, if the insurance is not warranted free of claims arising from a given risk, the underwriters are taken to have assumed that risk in exchange for the premium.

For this reason, among others, the Court of Appeals' analogy between an insurance policy covering a vessel on a chartered voyage and the charter party itself does not seem apt. A charter party is a contract designed to allow the charterer to use the vessel in a defined way for a prescribed period. If the vessel is rendered incapable of performing its charter services for a long period, the foundation is cut away—on general principles of supervening commercial frustration. The charterer has to give up the use of the ship but he also is freed from paying charter hire. But this "average reciprocity of advantage", normally achieved in the owner-charterer relationship on termination of the charter by a detention or requisition, is not paralleled in the insurer-insured relationship. The insurer will invariably retain the premium and suffer no detriment while the insured invariably forfeits continued protection and suffers the loss of premium. Since the very purpose of insurance is relief from uncertainty, the insured should be able to know when the prior insurance ends so that it may make immediate arrangements for procuring

effective new insurance and may thus avoid a break in coverage. In the owner-charterer relationship, neither the owner nor the charterer has expressly assumed the consequences of war and nothing inherent in the nature of the charter warrants placing these consequences on either party. The courts in charter cases were free to allocate the benefits on an arbitrary basis, of easy application and meting out rough justice. But insurance policies, in the nature of things, allocate many of the risks of uncertainty to underwriters, and there is therefore justification for placing some of the risk incident to "frustration" on the insurer and for regarding ease of application as a minor consideration in risk allocation.

We recognize, nevertheless, that a particular departure, though under compulsion, may not be the result of a peril at all, as when a vessel is requisitioned by the Government for a term of years and put to an entirely new use, normally to the economic advantage of the insured. Unless the policy stipulates to the contrary, it would not be fair to hold the insurer for the entire period of the requisition for the single premium fixed on the basis of a particular voyage of a rather definite length. But the question is always whether there has been such a requisition as should be regarded as a completely new employment, for which the owner should obtain new insurance.

B. On these applicable principles, the *Portmar* did not depart from the course of its insured voyage on January 5, 1942, or at any time prior to Feb-

ruary 19, 1942, so as to terminate the insurance. At any rate, the trial court might have found that as of the middle of February 1942 the situation had not taken definite enough form to end the insurance. It is at least questionable whether from the standpoint of the owner or master of the vessel on January 5, 1942, it was clear that the *Portmar* would be retained in Australia (had she not been damaged) for a period well in excess of the expected duration of the voyage. The nature of the governmental restraint was unresolved in the first months following the outbreak of the war and, so far as the record shows, the dominion exercised by the United States Army may have been nothing more than a temporary employment in an unprecedented military crisis. It is improbable that anyone in a position of responsibility was thinking in long-range terms. In January of 1942, the Maritime Commission still planned to have the *Portmar* return to the United States in February with a cargo of chrome ore, and a vessel of her burden might have been more useful as a trans-oceanic cargo carrier. Imputing all the master's knowledge to the owner, it was uncertain whether a return to a North Atlantic port within the expected time was precluded and whether the voyage out of Brisbane (*supra*, p. 8) was beyond the latitude permitted by the charter.

Not only was the situation in January and February ambiguous, but petitioner was unable to maintain communication with its master. What little information it had suggested a short restraint and called for a suspension of judgment until the

fleeting moment of time, irrespective of the anticipations of the parties when the interruption occurred.[20] The court was asked on each occasion to decide, in circumstances where a vessel under time charter was admittedly formally requisitioned,[21] whether the owner or the charterer was entitled to the requisition hire paid by the Government at a rate in excess of that stipulated in the charter. The problem in the final analysis was one of allocating the benefits that flowed from a wartime sovereign act which interfered with the accomplishment of the charter purpose. This allocation had to be on a more or less arbitrary basis since (a) neither the owner nor the charterer expressly assumed to any extent the consequences of war in the agreement, and (b) there is nothing inherent in the nature of the charter to warrant placing these consequences, whether favorable or unfavorable, on one party to the exclusion of the other.[22] Recognizing the impracticability of evolving a detailed formula by which the benefit could be equitably divided between the parties, the court determined, through

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[20] *The Claveresk*, 264 Fed. 276 (C.A. 2); *The Isle of Mull*, 278 Fed. 131 (C.A. 4); *Tamplin* v. *Anglo-Mexican Petroleum Co. Ltd.*, [1916] 2 A.C. 397.

[21] "[The requisition] made it impossible for * * * [any] private individual to use the [vessel], and did this under circumstances clearly showing to any sensible man that such indefinite taking would almost certainly outlast the life of the charter * * *." *The Claveresk*, 264 Fed. 276, 283 (C.A. 2).

[22] As heretofore noted, p. 33, *supra*, a charter is a contract of affreightment and as such contemplates a state of affairs that will enable the vessel to pursue the charter voyage or voyages without major interruption. War and its implications are completely foreign to the parties' undertakings and are in direct conflict with their implicit assumptions.

the application of the frustration doctrine (see pp. 34-36, *supra*), that the inception of the interruption was to be taken as the point of reference.[23] If it was probable at that time, taking into consideration not only then existing conditions but also subsequent developments, that the restraint would survive the charter term, the charter was to be deemed immediately frustrated and at an end. If on the other hand, the probability, judged by the same standard, was that the restraint would not survive the charter term, the charterer took the loss or gain occasioned by the differential between the charter hire and the requisition hire. In this way, a rough form of justice was meted out in a situation having no relation to the charter purpose itself.

The fixing of the inception of the interruption, or any other precise pre-ordained moment of time, as the point of reference for determining whether the insurance on a vessel has lapsed is another matter. The question is not then one of coping with a development wholly extraneous to the contractual relationship. The insurance policies have as their very purpose the allocation to the underwriters of many, though, perhaps, not all—of the risks of uncertainty. When war protection is asked and given, a higher premium is

[23] "The hardship of applying [this principle] to some cases * * * cannot be denied, but it will be found in the practical administration of justice better to allow even this hardship than for courts to enter upon the confusing, if not impossible, task of adjusting the equities between owner and the charterer." *The Isle of Mull*, 278 Fed. 131, 135 (C.A. 4).

accordingly fell into the error of requiring the insured to carry the burden of uncertainty the underwriters were compensated for assuming.

Also, from the standpoint of public policy, it is undesirable to encourage owners of American vessels to resist governmental orders on the ground, or in the belief, that they will lose war risk insurance protection by acquiescing in informal orders and restraints.

ARGUMENT

The Duration of the War Risk Insurance Policies on the *Portmar*

The war risk policies written on the *Portmar* contained, among other standard provisions, the *Free of British Capture* rider (*supra*, pp. 5-6) which warranted the insurance free of claims arising from Allied "Capture, Seizure, Arrest, Restraint, Detainment, Requisition * * *," excluding, however, unless the vessel be condemned, "losses otherwise covered" by the policies which are caused by "gunfire, torpedoes, bombs, mines or other implements of war * * *" (R. 70). The effect of this rider upon respondent's liability was the subject of controversy in the courts below.[6] The Court of Appeals held that the clause assumes

[6] The chairman of the board of directors of a marine insurance company testified in the District Court that the "losses otherwise covered" clause was inserted in the rider by the American Institute of Marine Underwriters to provide protection while an insured vessel was being detained for inspection (R. 251). The District Court refused to consider this testimony. It held that the rider was not ambiguous and by its terms covered losses caused by gunfire, etc. during any form of Allied capture. See fn. 36, *infra*, p. 58.

relevance only after it has first been established that the policies were still in force on February 19, 1942, the date of the claimed loss. Since the court was of the view that the insurance coverage had previously terminated, it did not consider the meaning of the *Free of British Capture* rider. It assumed *arguendo* that the District Court was right in holding that the rider did not excuse the underwriters on petitioner's claim, if the insurance was otherwise in effect. (R. 793.)[7]

Petitioner contends, and the District Court may have held (R. 747-51), that the *Free of British Capture* rider (along with the so-called "frustration" clause, see fn. 13, *infra*, p. 32) shows, in and of itself, that the policies were to continue in effect throughout the period of control by the Australian and American naval authorities—or, at least, until February 19, 1942 (Pet. Br. 21 *et seq.*). Petitioner also bases an argument (Pet. Br. 28 *et seq.*) on the special "held covered" agreement of February 6, 1942 (*supra*, p. 9). Because of the Court of Appeals' general treatment of the case, we do not consider these arguments but deal solely with the principle of marine insurance frustration laid down below, as that principle was applied to this case. The Court of Appeals held that, whether the *Portmar's* departure from its regular course was voluntary or involuntary, if it worked a frustration

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[7] The Court of Appeals assumed, in addition, that the *Portmar* became a "constructive total loss" within the meaning of that term as contained in the policies (R. 793). The District Court had made an express finding to that effect (R. 752).

of the underlying commercial venture and in effect substituted an entirely independent one, especially if the new venture resulted in an increase in the risk, the respondents were immediately relieved of their undertaking. The Court of Appeals observed that a charter party is deemed frustrated by a restraint or requisition if, viewed at its inception, the restraint or requisition appears likely to outlast the expected or stipulated duration of the charter period. Applying these principles, the court concluded from its analysis of the situation that the insurance on the *Portmar* ended at Brisbane on January 5, 1942.

We discuss, *first*, the general principles of marine insurance law applicable to departures by insured vessels from the course of the insured voyage, in relation to the duration of war risk policies; and, *second*, the application of those principles to the facts of this case.

A. *The general principles applicable to departures by insured vessels from the regular course of the insured voyage.*

1. There is an implied warranty in every contract of marine insurance covering a vessel or its cargo on a particular voyage that the ship will strictly maintain the regular course of that voyage. *Hostetter* v. *Park*, 137 U.S. 30; *Hughes* v. *Union Ins. Co.*, 8 Wheat. 294; *Coles* v. *Marine Ins. Co.*, 3 Wash. CC 159 (C.C. Pa.); Marine Insurance Act, 1906, 6 Edw. 7, c. 41, § 46; 3 Kent, *Commentaries*, 312. This follows from the plain fact that every departure alters the risk which the underwriter assumed

when the policy was written. And on the same reasoning, the implied warranty extends to the time in which the insured voyage ought to be completed. Failure to commence and complete the voyage with the reasonable expedition that the underwriter has the right to expect, in the absence of an express provision in the policies to the contrary, will similarly terminate the insurance. *Columbian Insurance Co.* v. *Catlett*, 12 Wheat. 383; *Kingston* v. *Girard*, 4 Dallas 274; *Oliver* v. *Maryland Ins. Co.*, 7 Cranch 487; Marine Insurance Act, 1906, *supra*, § 48; 3 Kent, *Commentaries* 315.

In the event, however, that the vessel is compelled to deviate from its course because of considerations of safety or other circumstances beyond the control of the master or owner, the implied warranty has not been breached. The vessel in this situation is considered not to have deviated, or, in the terms of the English Marine Insurance Act, 1906, her deviation is excusable. *The Willdomino* v. *Citro Chemical Co.*, 272 U.S. 718, 727; *Constable* v. *National Steamship Co.*, 154 U.S. 51, 66; *Hostetter* v. *Park*, *supra*, 137 U.S. at p. 40; *Scott* v. *Thompson*, (1805) 1 B & P NR 181; *Driscol* v. *Passmore*, (1798) 1 B & P 200; *Elton* v. *Brogden*, (1747) 2 Strange 1264; *Driscol* v. *Bovil*, (1798) 1 B & P 313; Marine Insurance Act, 1906, 6 Edw. 7, c. 41, §§ 46, 49.[8] It makes no difference, accord-

[8] The Marine Insurance Act, 1906, which in large measure is a codification of the common law of marine insurance and the law merchant [*British & Foreign Marine Ins. Co.* v. *Gaunt*, (1921) 2 A.C. 41, 58], provides in § 49 that deviation or delay

ing to the English view at least, that the compelling circumstances have required the vessel to abandon the original *terminus ad quem*. Marine Insurance Act, 1906, *supra*, § 45; *Rickards* v. *Forestal Land Timber & Railways Co., Ltd.*, [1942] A.C. 50.[9] Moreover, it is irrelevant that the departure

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in prosecuting the voyage contemplated by the policy is excused:

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(b) Where caused by circumstances beyond the control of the master and his employer; or

* * * * *

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; * * *

In addition, the section excuses deviations to save human life, to aid a ship in distress where human life may be in danger (§ 49(e)), or to obtain medical or surgical aid if reasonably necessary (§ 49(f)). Cf. *Scaramanga* v. *Stamp* (1880) 49 L.J. C. P. 674; *Lawrence* v. *Sydebotham*, (1805) 6 East 45; *Crocker* v. *Jackson*, Sprague R. 141, quoted in Arnould on *Marine Insurance*, 12th ed. (1939) § 434.

[9] § 45 of the Marine Insurance Act reads:

(1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

The distinction between a deviation and a change of voyage has been recognized in this country. As was observed by Chancellor Kent, a deviation becomes a change of voyage when "[T]he original place of destination [is] abandoned, in order to go to another port of discharge." *New York Firemen Ins. Co.* v. *Lawrence*, (1816) 14 Johnson (N. Y.) 46, 57; 3 Kent, *Commentaries* 317. As far as we can determine, there never has been a suggestion in an American decision that a change of voyage has any other meaning than that set forth in the English Act. Cf. *Marine Ins. Co. of Alexandria* v. *Tucker*, 3 Cranch 357.

was necessitated by an uninsured risk [*Scott* v. *Thompson*, (1805) 1 B & P NR 181; Marine Insurance Act, 1906, *supra*, § 49; Arnould on *Marine Insurance*, 12th ed. (1939) § 435, but cf. *O'Reilly* v. *Royal Exchange Assurance*, (1815) 4 Camp. 246], or that the risk of loss from insured perils was increased by reason of it. *Maryland Ins. Co.* v. *LeRoy*, 7 Cranch 26; *Burgess* v. *Equitable Marine Ins. Co.*, 126 Mass. 70; *New York Firemen Ins. Co.* v. *Lawrence*, 14 Johnson (N.Y.) 46; *Middlewood* v. *Blakes*, (1797) 7 T.R. 162, 101 Eng. Reprint 911.[10]

2. It is not open to serious question that the *Portmar* neither deviated nor changed its voyage within the special meaning these terms have been afforded in marine insurance. From the time the vessel arrived at Suva, Fiji Islands, on December 20, 1941, until it fell victim to the Japanese aerial attack in Darwin harbor two months later (February 19, 1942) it was under the complete dominion of Allied military and naval authorities (see pp. 7-11, *supra*). The orders the master received were lawful commands with which he was under a legal duty to comply. *United States* v. *Russell*, 13 Wall. 623; cf. *The Vernon City*, 70 Lloyds List R. 279;

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[10] In these cases it was stressed that the importance of a departure from the contemplated voyage is the fact that the insured risk is altered, irrespective of whether it is in fact increased. It is this alteration that is excused in the event of an involuntary departure. Cf. *Scott* v. *Thompson*, (1805) 1 B & P NR 181, where the departure was held not to vitiate the policy although the risk of loss from the perils of the sea which the underwriter had assumed was enlarged as a result thereof.

The Ben Hann, 75 Lloyds List R. 187.[11] In addition, his obedience represented the fulfillment of the moral obligation of a United States citizen in charge of a vessel of American registry. As Lord Ellenborough observed, a departure is not voluntary if the vessel has been subjected to a degree of force which "either physically [the master] could not resist, or morally as a good subject he ought not to have resisted." *Phelps* v. *Auldjo,* (1810) 2 Camp. 350, 351.[12]

But it is important to note the grounds and circumstances of the decisions holding that a particular policy was not terminated by an involuntary departure and therefore remained in effect at the time of the claimed loss, for the rule of these cases may not end the matter where dissimilar circumstances are present, as they may possibly be here. (See *infra,* pp. 40 *et seq.*). The two decisions upon which petitioner places principal reliance—*Scott* v. *Thompson,* (1805) 1 B & P NR 181, and *Richards*

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[11] While the routing orders received subsequent to the vessel's arrival at Suva were issued by Australian authorities, American officials at each port directed the master to obey (*supra,* pp. 7-11). Under the prevailing war conditions, these orders had at least *prima facie* validity.

[12] In the *Phelps* case, a British merchantman while at an Icelandic port was ordered by a British man-of-war to go out to sea to examine a strange vessel. The master's compliance was held a deviation because it was without protest. In light of Lord Ellenborough's remarks it is apparent that the court did not see any clear moral obligation in that instance. It seems doubtful that the same view would have prevailed had the order been given in a period of national emergency. "[R]estraint of princes may consist simply of executive orders of the sovereign * * * for violations of which the carrier may be punished." *Betesh* v. *Fire Ass'n of Philadelphia,* 187 F. 2d 526, 529 (C.A. 2).

v. *Forestal Land Timber & Railways Co., Ltd.*, [1942] A.C. 50—serve as illustrative examples. In the former, the underwriters had issued a policy covering goods on a voyage from Liverpool to Amsterdam. The vessel was approached by a warship while under way and detained by her at Falmouth for a period of six weeks. Upon release the merchantman continued to her destination but was caught en route in a severe storm which caused a sea leak. The insured cargo was found to have been damaged as a result of the leak and the shipper made claim for this damage under the policy. The underwriters claimed that the insurance had ended, but the court held it still in force.

The *Rickards* case involved war risk policies written in August, 1939, on British owned cargo to be carried on three German vessels. When the war broke out, the ships were on the high seas plying the courses contemplated by the policies. Pursuant to orders issued previously to all German merchantmen by the German government, which set forth procedures to be followed in the event of hostilities, the masters first took refuge in neutral ports and then, after varying periods of delay, sailed for Germany (which was not on the insured route). One of the vessels reached its newly acquired destination. The other two, upon being accosted by Allied warships, were scuttled by their crews to avoid capture. The cargo owner made claim for a total or, in the alternative, constructive total loss. Here, too, recovery was allowed.

The holding in each case was that since there had not been a breach of warranty (*i.e.*, a deviation or change of voyage), the insurance was still in force.[13] But these holdings were in circumstances where (1) the restraint operated as an immediate peril from the standpoint of the insured, and (2) this peril was one of which the underwriter was or should have been cognizant. Under such conditions, the insurer may properly be held on his undertaking. As one English text-writer has observed, a marine policy is written with the underwriter's recognition that the vessel, by merely engaging in an ocean voyage, subjects itself to numerous perils, among them restraints of princes and the stresses of weather. Arnould on *Marine Insurance*, 12th ed. (1939) § 435.[14] The underwriter may not be willing, for the stipulated premium, to

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[13] In *Rickards*, the House of Lords then considered the effect of the standard "Frustration" clause upon respondent's liability. This clause, which is a part of the war risk endorsement on the policies here involved, provides: "Warranted free of any claim based upon loss of or frustration of the insured voyage or adventure, caused by arrests, restraints or detainments, of kings, princes, or peoples." Its adoption in 1919 resulted from the decision in *Sanday & Co.* v. *British and Foreign Marine Ins. Co.*, [1915] 2 K.B. 781, [1916] 1 A.C. 650, which read the insurer's undertaking on a cargo policy as extending to loss of the adventure as well as to loss of the goods themselves. The House of Lords concluded that the clause had no applicability where the claim was based on the loss of the goods rather than on the loss of the adventure, the goods remaining unaffected. Cf. *Betesh* v. *Fire Ass'n. of Philadelphia*, *supra*, fn. 12. By the same token a "frustration" clause in a hull policy is not relevant where the claim is, as in the instant case, for the loss of the vessel.

[14] That this is more than a mere legal fiction is clear from an examination of the provisions of any standard marine policy. The basic clauses, endorsements, and riders explicitly cover the liability or non-liability of the underwriter on every common peril.

assume the loss from a particular risk. The insurance in that event will be warranted free of claims arising from that risk, but as to other risks the insured has paid a price by way of the premium and the underwriters have assured those risks in exchange for the premium.

3. For this reason, among others, the Court of Appeals' analogy between an insurance policy on a charter voyage and charter party itself does not seem apt.[15] The charter party is a contract of affreightment whose purpose is to provide the charterer with a defined use of the vessel within a prescribed or expected period. The parties contemplate that the vessel will remain available for this use during the charter period. If, due to the operation of a supervening force beyond the control of either party, the vessel is rendered incapable of performing its charter duties, the foundation of the charter is weakened. And if the unanticipated incapacity is of a nature that suggests a long duration, the foundation is cut away entirely. It is relatively insignificant to the charterer what the cause of the vessel's inability to perform may be. The essential fact is that the vessel cannot go for-

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[15] The court said: "A policy, upon a voyage charter must be understood to be coextensive with the voyage, and the 'restraint' clause should be construed as it would between the owner and the charterer" (R. 801).

It would be strange if the underwriters' liability ceased at the precise moment the contract between the owner and the charterer was frustrated in view of the radically different nature of the two sets of relationships, the rule that doubts are resolved in favor of the insured, and the fact that, as we elaborate *infra*, pp. 36-37, the test applied by the Court of Appeals will have a uniformly unfavorable impact on the insured and a uniformly favorable effect on underwriters.

ward with the voyage upon which the charter was founded.

This is the rationale supporting the principle that a charter party is immediately terminated if a chartered vessel is restrained for a period that, viewed at its inception, is likely to survive the charter. *Texas Co.* v. *Hogarth Shipping Co.*, 256 U.S. 619; *The Claveresk*, 264 Fed. 276 (C.A. 2); *The Isle of Mull*, 278 Fed. 131 (C.A. 4), certiorari denied, 257 U. S. 662; *The Frankmere*, 278 Fed. 139 (C.A. 4), certiorari denied, 257 U.S. 662; *Tamplin S.S. Co.*, v. *Anglo-Mexican Petroleum Co., Ltd.* [1916] 2 A.C. 397; *Heilgers & Co.* v. *Cambrian Steam Nav. Co.*, (1917) 33 Times L.R. 348, affirmed, (1917) 34 Times L.R. 72; *Bank Line* v. *Capel* [1919] A.C. 435; *Countess of Warwick Steamship Co.* v. *Le Nickel Societe Anonyme*, [1918] 1 K.B. 372; *Hirji Mulji* v. *Cheong Yue S.S. Co.*, [1926] A.C. 497. It is nothing more or less than the application of the general doctrine of supervening commercial impossibility, first articulated in England in *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826, to a particular contractual relationship.[16] The continuing availability of the vessel being the main

[16] The *Taylor* case suggested, *contra* to the view taken *in Paradine* v. *Jane* (1647) Aleyn 26 and approved by Lord Ellenborough in *Atkinson* v. *Ritchie* (1809) 10 East, 533, that mutual obligations of a contract may be discharged by supervening impossibility of performance by virtue of an implied term. Subsequently, this principle was extended to cover the situation where circumstances supervene which render performance impossible *in the time contemplated by the parties*. *Jackson* v. *Union Marine Insurance Co.* (1874) L.R. 10 C.P. 125; *Horlock* v. *Beal*, [1916] 1 A.C. 486; *Geipel* v. *Smith* (1872) L.R. 7 Q.B. 404.

circumstance upon the basis of which the parties contracted, the vessel's unavailability in and of itself constitutes a significant alteration, regardless of the particular event from which that disability stems.[17]

It seems to us to follow that a charter party may be deemed frustrated even if the frustration is the result of an occurrence which should have no effect upon the continuation of the underlying insurance protection. If, for example, a neutral vessel under charter were to be detained by a belligerent, and if that detention, viewed at its inception, were likely to survive the date that the vessel was expected to reach the *terminus ad quem*, the charter party would automatically be at an end. *Lloyd Royal Belge Societe Anonyme* v. *Stathatos* (1917) 34 Times L.R. 70, affirming 33 Times L.R. 390.[18]

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[17] The supervening event held to have frustrated the charter party in the above cited cases (p. 34) was a requisition. The principle, however, has always been broadly stated. "It long has been settled in the English courts and in those of this country, federal and state, that where parties enter into a contract on the assumption that some particular thing essential to its performance will continue to exist and be available for the purpose and neither agrees to be responsible for its continued existence and availability, the contract must be regarded as subject to an implied condition that, if * * * the particular thing ceases to exist or be available for the purpose, the contract shall be dissolved and the parties excused from performing it." *Texas Co.* v. *Hogarth Shipping Co., supra*, 256 U.S. at 629-30. And there are a few cases dealing with other types of supervening events, *e.g.*, *Lloyd Royal Belge Societe Anonyme* v. *Stathatos* (1917) 34 Times L.R. 70, affirming (1917) 33 Times L.R. 390 (detention); cf. *Allanwilde Transp. Corp* v. *Vacuum Oil Co.*, 248 U.S. 377 (refusal of government to grant sailing clearance).

[18] According to the prevailing view, this is true even if the charter party contains a clause excusing performance during "restraints". As expressed by Lord Haldane in *Tamplin* v. *Anglo-Mexican Petroleum Products Co.*, [1916] 2 A.C. 397,

Selection of the particular moment when the charter ended will ordinarily work out fairly, for though the detention or requisition benefits are denied the charterer from the given date and accrue to the owner, relief from the burdens of charter hire, which is almost axiomatic, is as a general rule equivalent. But there is no similar reason for declaring the insurance at an end. The policy contemplates such detentions and by its terms the underwriter will generally have either accepted liability for risk of loss during detention or negatived that risk by accepting a single indivisible premium no part of which will be returned on the termination of the risk before the anticipated term of protection has ended.[19] The "average reciprocity of advantage" (cf. *Jackman* v. *Rosenbaum*, 260 U.S. 22, 30) normally achieved in the owner-charterer relationship by termination of the char-

406-7, "Although the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence itself may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation." Cf. *The Claveresk*, 264 Fed. 276, 281-3 (C.A. 2); *Metropolitan Water Bd.* v. *Dick, Kerr & Co.*, [1918] A.C. 119.

This question of the duration of a charter party after a major governmental restraint is to be distinguished from that of the events which will excuse performance under the terms of a restraint clause as constituting a restraint. Cf. *The Styria*, 101 Fed. 728 (C.A. 2), modified on other grounds, 186 U.S. 1.

[19] The fact that the insurance is terminated at a time when the voyage is only partially completed does not entitle the insured to a *pro rata* recoupment. *Hearne* v. *Marine Ins. Co.*, 20 Wall. 488-494. Rider F-300 (R. 70) specifically provides against apportionment. See *supra*, p. 6. Thus, an *earlier* fixed date for termination, at the *onset* of uncertainty, will not do as well as a *later* one, since it will defeat the purpose of war risk insurance and apportion the risk unfairly.

ter is not paralleled in the insurer-insured relationship. The insurer will invariably retain the premium and suffer no detriment, while the insured will invariably be disadvantaged by forfeiting continued protection and sustaining the loss of the premium. And since the very purpose of insurance is relief from uncertainty, the insured should be able to make other arrangements for procuring effective insurance protection when the prior insurance ends. If the facts are indeterminate and the situation is fluid, to select with the aid of hindsight the earliest moment as ending the voyage, although a reasonable insured might have viewed the facts differently, shifts the burden of uncertainty from the compensated insurer to its insured, thereby defeating a principal reason for such insurance.

These considerations suggest other sharp distinctions between a marine policy and a charter party. It is usually immaterial whether the charterer and the owner become immediately aware that the charter party has been frustrated by a particular interruption of the voyage. Concededly, it is preferable if they may be advised at all times of the status of their agreement. But unlike the case of the insured, who must at once reinsure if his policy lapses, ordinarily no instantaneous action is required of them if the charter is dissolved. Moreover, the question presented in the charter frustration cases relied on by the Court of Appeals plainly lends itself to the subsequent determination that the charter was frustrated at a particular

charged and paid, and the events of war (or, at least, many of them) produce the hazards insured against. The considerations are far different from those prevailing in the case of a charter party. See also *infra*, pp. 51-58.

4. The voyage deviation cases, as we have seen (*supra*, pp. 30-33), stand for the proposition that when the involuntary departure from the course of the insured voyage is the product of a peril operating on the subject matter of the insurance, the underwriter's liability for a subsequent loss is to be determined by reference to the terms of the policy. The insurance itself, for whatever protection it affords, has not been forfeited and is still in effect, whatever may be the term of the charter for the voyage. It is possible, however, that a particular departure, though under compulsion, is not the result of a peril at all. The most common instance is where the vessel is requisitioned by the Government for a term of years and is put to an entirely new use. It is probable that such a requisition would normally be to the economic advantage of the insured. For the period of its duration he would be relieved of the necessity of seeking cargoes, and the requisition hire received from the Government would in all probability be equal to, if not in excess of, the prevailing rate in private shipping circles. In such a situation—unless the policy provides to the contrary—it would not be fair to read the insurer's obligation as protecting the vessel for the entire requisition period for the single premium which had been determined on the

basis of a particular voyage for a more or less definite anticipated length. Unless specially covered, a substantial requisition use should be regarded, in fairness to the underwriter, as a completely new employment requiring the insured to forsake at some point the coverage purchased on the charter voyage in favor of new insurance applicable in terms to this substituted employment. The question is: Has there been such a requisition, beyond the terms of the charter for which the owner should reinsure? In Point B, we discuss this issue as it relates to the present facts.

B. *Under the applicable principles, it cannot be said that the insurance on the Portmar terminated on January 5, 1942.*

The question, then, is whether, if the *Portmar* departed from the course of its insured voyage, such departure warranted the termination of the insurance on January 5, or at some other date prior to February 19, 1942, in spite of the fact that the departure was involuntary and did not represent a breach of warranty (*supra*, pp. 29-33). We submit that, under the particular circumstances of the case, either the answer should be in the negative or that it would be open to the trial court so to find. We do not contend that respondents would have remained liable on their undertakings for an indefinite period should the vessel have circled Australia, under governmental orders, for the duration of the hostilities. That problem is not before the Court. We suggest, however, that as of the middle of Feb-

ruary 1942, and certainly later than January 5, 1942, the date fixed on by the Court of Appeals, the situation had not taken definite enough form to end the insurance and the policies still covered the vessel against loss from a risk insured.

The Court of Appeals, analyzing the situation some ten years after its occurrence, drew the inference that the *Portmar* had been requisitioned at Brisbane and would have been retained in Australia (had she not been damaged) for a period well in excess of the expected duration of the charter voyage. But it seems questionable (a) whether that inference is compelled by the record to the extent that findings by the District Court were unnecessary,[24] and (b) whether, in any event, that conclusion should have been reached on the basis of the knowledge and expectations of the master of the vessel in Brisbane on January 5, 1942, or of the owner on the same date, which is the standard the Court of Appeals applied ("the situation as it appears at the time of the interruption"; R. 800). In addition, and most significantly, the Court of Ap-

[24] The court read the routing orders received at Brisbane as being the commencement of a requisition "which in every probability would outlast the year [1942] and certainly would extend over six months." (R. 796) The District Court had not made a finding to that effect, and it does not appear that the record constrained such a finding. For reasons which we shall develop later, we think that this was a disputable finding of fact which should have been left to the District Court, and that its inevitability is debatable regardless of whether it is approached from the vantage point of the master at Brisbane on January 5, 1942, the ship owner at that time, or the Court of Appeals in 1952. Hence, the lack of a finding of fact by the District Court was not an oversight or omission which should be supplied, even in admiralty, by an appellate court.

peals read the policy as coextensive with the voyage charter (R. 801)—a criterion we believe to be incorrect (*supra*, pp. 33-40)—and its findings were therefore vitiated, in our view, by an erroneous legal standard and not entitled to the ordinary weight.

1. The nature of the governmental restraint, in terms of duration and impact upon petitioner, was entirely unresolved and indefinite in the first months following the outbreak of the war in December 1941. The vessel was not formally requisitioned by the United States until November 1942 (R. 625). Furthermore, the Government did not take possession of her until after the Darwin attack on February 19, 1942. She was in Australian waters during January and the early part of February 1942, pursuant to a series of routing orders issued by Australian naval authorities. The master was directed to comply with these orders by various United States Consuls and individual American naval and army officers. The United States Army exercised some degree of dominion over the vessel in that it determined the cargo that was to be carried between ports. But, as far as the record shows, that was nothing more than a temporary employment occasioned by an immediate and pressing military crisis (R. 279-97). The assurances of the American officials relative to the propriety of the Australian routing orders were couched in terms of the necessity of cooperating with that government (R. 280-91). At no time did any of these officials suggest to the master (nor did he under-

stand) that the vessel was being taken over by the United States and that the Australians were concerned solely with the problems of navigation. Nor did they indicate on any occasion that the vessel would be held in Australia beyond the accomplishment of the mission at hand (see R. 279-97). It is improbable that anyone in a responsible position was thinking in long-run terms. Military operations were undoubtedly on a day-to-day basis with continuous adjustments being made to meet changing conditions. When the *Portmar* was ordered to proceed from Darwin to Wyndham with 2,000 drums of gasoline, the master protested that this was not a proper use for a vessel of her size and suggested that a smaller vessel be substituted. The answer was that the situation, being desperate, necessitated rapid action and, since the *Portmar* was the most available vessel for the mission at the time, it had to be dispatched. (R. 290-1.)

The Court of Appeals attached considerable weight to the testimony of an American colonel who first arrived at Melbourne in the middle of March 1942 to take charge of water transportation in the Southwest Pacific area (R. 795). This officer, after referring to the seriousness of the military situation, stated that the military took control of "[e]very vessel we could get our hands on" and that these vessels were held during the rest of 1942 and sometimes longer (R. 186-7). While this testimony does suggest that the *Portmar* might have been restrained indefinitely, that conclusion is not ineluctable; it is equally possible, if not probable,

that the colonel's superiors in Washington would have regarded the *Portmar's* use as trans-oceanic cargo carrier or troopship of greater strategic importance.[25] And the Maritime Commission, in January 1942, still planned to have the vessel return to the United States some time in February with a cargo of chrome ore (*supra*, p. 9) (R. 142-3). At that time the war was in its second month, and official bodies in this country were aware, in general outline at least, of its progress. Whether or not the Commission could have carried out this plan, if in February it still harbored it, is not answered by the record. Certainly, however, a reasonable possibility existed that the Commission could have given effect to determinations that it made. Moreover, the colonel was testifying primarily as to events subsequent to February 19, 1942, and the measures that were instituted in the light of those events. It may be that in April or May of 1942, a disinterested observer would or should have recognized that it was the intention of the responsible officials in the area to requisition for an indefinite period all available means of transportation. The colonel or another officer may have even expressed this intention, but their desires had to be reconciled with the needs of other theatres of war and with the orders of superiors taking an overall view.[26]

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[25] If conditions in the southwest Pacific were as bad as the colonel's testimony indicated, the War Department might well have decided that the further use of the *Portmar* in Australia would be futile (R. 184-7).

[26] In February 1942, the War Shipping Administration was established with authority to control the operation of all American ocean-going, non-combatant vessels. The Admin-

Hence, it does not follow that on January 5, or at any time up until February 19, it was or should have been apparent, to one with the access and exposure to information of the master, that the vessel would be retained. Nothing in the colonel's testimony suggests that the orders given the vessel on January 5 constituted a single requisition of considerable duration or the forerunner of an unbroken chain of requisitions (R. 188-99). And these orders, on their face, were merely a direction to proceed from Brisbane to Darwin without any indication of a subsequent use (R. 287).[27] From the standpoint of the master, and imputing all his knowledge to the owner, it was by no means clear that a return to a North Atlantic port within the expected time was out of the question nor even that

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istrator was directed, in exercising this control, to comply with strategic military requirements and to collaborate with all interested agencies in order to secure the most effective utilization of shipping in the prosecution of the war. Executive Order 9054, February 7, 1942, 7 F.R. 837. A pooling of American shipping was in contemplation.

[27] A substantial portion of the cargo carried to Darwin was high-octane gasoline brought by the *Portmar* from the United States (R. 285-6, 715, 720-21). Since the northern part of Australia was a very critical area during early 1942 (R. 184), the master could have easily interpreted the Brisbane orders as being merely the result of a decision that the gasoline could be employed to best advantage at Darwin. In any event, it would have been strange indeed if he had taken these orders to constitute a requisition of the vessel or to have been an unmistakable preliminary step toward a requisition. And the fact is that he clearly did not regard the vessel as having been put to other than an accommodation use.

The insurance specified that the voyage was to *ports* in the Philippines (or Australia). The master was aware that the charter spoke in the same terms. His practical construction that his activity after January 5, 1942, was related to the charter is entitled to some weight.

the voyage out of Brisbane was outside the terms of the charter and the latitude it permitted.

2. Quite apart from the inherent ambiguity of the situation, and aside from knowledge imputed to it through a master who could not communicate, petitioner did not possess at any time prior to February 19, 1942, sufficient information to evaluate the nature and extent of the voyage interruption. What little information it had suggested a short restraint. The prudent course may well have been to suspend judgment until the situation might be appraised with more assurance after the trend was more definite.

The first post-Pearl Harbor word of the vessel petitioner received came on January 19, 1942, which was two weeks after the time when, in the opinion of the Court of Appeals, the insurance had terminated (R. 720). On that date, petitioner was informed by the Maritime Commission's agent on the charter that the vessel was then in Australia but would load on her return voyage at New Caledonia during the latter part of February for discharge in Philadelphia in April (R. 142-3). An explanation for the vessel's being in Australia was not given. Petitioner assumed, however, that it was the result of orders issued by the Government. (R. 145.) This was a perfectly logical inference in the light of the outbreak of the war and conditions in the Pacific as reported in every newspaper. Manila was in danger of Japanese capture from the outset and in fact had been declared an open city on December 25, 1941. See *United States v. Caltex (Philippines), Inc.*, No. 16, this Term, de-

cided Dec. 8, 1952, slip op. p. 2. It therefore could be presumed that the officials in charge of the prosecution of the war would have diverted a Manila-bound vessel to another port in the interest of preserving her and her cargo.[28] But it would have taken a high degree of clairvoyance to have foreseen that the vessel would be retained in Australia for any appreciable period of time. The insured is asked to draw a definitive graph when only a few closely clustered points were known. The private citizen with no knowledge of the specific problems presented by military operations and logistics in the Australian war zone might well have presumed that a large cargo vessel would be sent back to the United States, immediately upon discharging its cargo, for further employment on intercontinental voyages. In this particular case, however, petitioner did not need to indulge in such speculation since it was explicitly informed that the Maritime Commission intended to return the *Portmar* within approximately a month (R. 143). It may be that the Commission did not know of the military use to which the vessel had been placed. As the Court of Appeals observed (R. 797), the record is barren on this point. But petitioner certainly had the right to rely on the representations made by the Commission, at least where there was nothing to indicate that the return voyage was a physical or practical impossibility.

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[28] And as the vice president of petitioner observed: "We knew our captain; we knew that he would not have gone to Australia except for Government orders" (R. 145).

There was no lack of diligence on the part of either petitioner or its employees. During December 1941, petitioner contacted the Navy Department in Washington and naval officials in San Francisco in an effort to determine where the vessel was and what she was doing. The only information forthcoming was to the effect that the vessel was "safely afloat" (R. 141). And the master of the *Portmar*, who was the only responsible employee with first-hand knowledge of the restraint, endeavored at every port of call to cable petitioner as to what had occurred. On each occasion, he was told that cable messages could not be transmitted because of considerations of security or the inadequacy of communication facilities. (R. 718-9.) In addition, the master wrote a letter to petitioner from the Fiji Islands in the latter part of December 1941, explaining the developments up to that point. The letter was not received. (R. 718.) It was not until March 24, 1942, that the master, having just arrived in Melbourne, Australia, was able to communicate effectively with his employer. His cablegram of that date, advising of the condition of the vessel, followed by over a month the February 18 letter from the Maritime Commission and the telegram from the War Shipping Administration on February 23, by which petitioner first learned of the specific location of the ship and of the Darwin attack. (R. 145-146, 603-4.) On April 1, 1942, the master sent another cable which briefly summarized the vessel's movements up to February 19 (R. 603). Thus,

it was the very day of the claimed loss (February 19, 1942) before petitioner knew anything more than that the *Portmar* was in Australia and five weeks more before its precise routing was made clear. As far as petitioner could ascertain on February 19, 1942, the vessel was literally as well as legally on the course of the insured voyage, which had been extended earlier in the month to Australia by agreement of the underwriters (*supra*, p. 9) (R. 720).

3. The foregoing discussion demonstrates, we believe, that the situation at Brisbane on January 5, 1942, was susceptible of more than one interpretation insofar as the course of future events was concerned. The Court of Appeals chose, in 1952, to draw one inference as to the nature of the restraint imposed upon the *Portmar*. But on January 5, 1942, other inferences were at least equally possible and consistent with the facts, as we have just shown.[29] In these circumstances, it was the function of the District Court and not the Court of Appeals to determine, in the first instance, the nature of the restraint as it was objectively and, we submit, as it must have appeared to the insured. *Fountain* v. *Filson*, 336 U.S. 681.

It is clear from the findings of fact and conclusions of law filed by the trial court that it did not.

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[29] Respondents' position at trial was that the insurance terminated "when there was a determination to do something with the vessel other than make it a round trip back to the United States." This occurred in respondents' view at Wyndham on February 8, 1942. (R. 113.) In our view, it is doubtful that any such determination was ever made before the claimed loss, consciously or unconsciously, by the American authorities.

undertake to make any such determination. Judge Ryan had apparently regarded the *motivation* for the vessel's departure from the insured voyage route, and nothing else, as material on the termination question (R. 744-5), and therefore, although he did reject respondents' contention that the homeward voyage had been voluntarily abandoned (R. 746), he did not concern himself with the question of the probable duration of the restraint. As far as may be determined from the record, neither petitioner nor respondents adduced their proof in the District Court on the basis of the principles subsequently laid down by the Court of Appeals.[30] Therefore, once the court of appeals decided that the nature and prospective duration of the restraint was the crucial issue, it should have remanded the case for further proceedings instead of disposing of the matter itself by way of the debatable assumption that a lengthy requisition had been instituted. However consistent with the facts it may be to view the developments at Brisbane as a seizure initiating a requisition, or a series of requisitions, that would outlast the probable length of the charter, that theory is not the only tenable or reasonable one entirely consistent with the facts then known. The finding is of the type that should ordinarily be left to the trial court to make upon a complete record specifically designed for that purpose.

4. Furthermore, the Court of Appeals concluded

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[30] The Court of Appeals said: "We have found no decision under a marine policy which is certainly relevant * * *" (R. 798).

that the insurance was forfeited at Brisbane on January 5, without determining what petitioner's expectations were or should have been at that time. It seems that the court did not regard them as having any significance whatsoever. It said that "we must interpret the written words [of the policy] by trying to place ourselves in the position of the parties, had they been faced in advance with the actual event: the seizure at Brisbane. * * * we cannot believe that they would have agreed that the [restraint of princes] clause so far transmuted the undertaking." (R. 802). It may be that had petitioner been faced with this particular "restraint" in advance, and had it felt obliged to give it the same connotation that the court selected, it would have seen the occasion as warranting the purchase of new coverage before the voyage started. But petitioner was in fact confronted with the Brisbane routing orders on January 5 (if the knowledge of the master is imputed to his employer), and it cannot be assumed that at that moment its proper expectation was that the vessel would stay in Australia beyond the time it was due in Philadelphia (in April 1942) and that as a consequence all insurance was ended.

The consequences of a forfeiture of insurance are both serious and unfavorable. The premiums paid must be regarded as totally spent, and nothing is recoverable from the underwriter. See *supra*, pp. 36-37. This means that in the event that the insurance on the *Portmar* ended at Brisbane, respondents received a substantial windfall because al-

though they had demanded and obtained a premium of about $13,000 for the undertaking of certain risks over a period extending from late November 1941 to April 1942, for three months of that period they would have been exposed to no risks whatsoever, and the termination of the risk would have coincided almost exactly with the most acute stage of the insured's need for war risk insurance. Petitioner was certainly not required to regard an order to proceed from one Australian port to another, primarily for the purpose of discharging the government-owned cargo brought from the United States, as entailing the loss of insurance coverage and entitling the insurers to regard the entire premium as earned.[31]

The question remains whether the legitimate expectations of petitioner on January 5 are a pertinent consideration. When the essential nature of war risk insurance is taken into account, it is difficult to see how these expectations can be ignored. Petitioner purchased war and marine risk coverage in the first place because it was economically undesirable for it to assume the risk of loss. The

[31] It is well settled that a construction of an insurance policy which will work a forfeiture of coverage is to be avoided wherever possible. *Knickerbocker Life Ins. Co.* v. *Norton*, 96 U.S. 234; *Travelers Protective Ass'n* v. *Jones*, 91 F. 2d 377 (C.A. 5). As was said by the Second Circuit in *Henjes* v. *Aetna Ins. Co.*, 132 F. 2d 715, 719: "Had the insurers meant to have a breach of the warranty put the [vessel] beyond the coverage of the insurance for the remainder of the term while the premium based upon insurance for the whole term was kept they should have made that convincingly clear." This language would seem to be even more pertinent where no breach of warranty is involved and the question is whether an event totally beyond the control of the parties forfeited the coverage. Cf. fn. 32, *infra*.

continuation of that coverage, or the substitution of other and equally effective coverage, was at all times a matter of vital importance to it. If the existing insurance terminated, petitioner had simultaneously to take steps to reinsure. The policies on the *Portmar* would hardly have served their purpose if they abruptly expired at a time when petitioner had good cause to believe that they continued in force and when the war risk was at its height.[32] If war risk insurance is not to be a misnomer, the insured must be afforded such time as is reasonable in the circumstances of the individual case to appraise an evolving situation, to recognize its implications, and then to obtain new coverage to the extent that the situation requires.[33]

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[32] Respondents' awareness of the imperative necessity of continuous protection is demonstrated by the presence of the "Held Covered" clause in the policies, by the terms of which they agreed to hold the vessel covered "in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required." (R. 70). As the District Court noted, this clause is not applicable in the instant situation because no breach of warranty is involved (R. 751). Had the *Portmar* voluntarily and without reasonable cause left the insured route and pursued another, it is clear that the insurance would have continued, providing petitioner complied, *upon learning of the departure* with the conditions contained in the clause. This being the case, it would be anomalous to read into the policies an understanding that a departure, not a breach of warranty but instead the consequence of war operations, forfeits war risk coverage immediately, irrespective of the anticipations or knowledge of the insured.

[33] By fixing January 5 as the moment when the insurance lapsed, the court below made it virtually impossible for petitioner, in any circumstances, to maintain an unbroken chain of coverage. Even when it is recognized that reinsurance is necessary, it takes time to procure it. While the record is not

In this respect, as we have pointed out above (*supra*, pp. 33-40), a marine insurance policy differs from a voyage charter, which can properly be deemed ended from the very inception of the governmental interruption. Unlike a charter party, a marine war risk insurance policy is designed to cast much, if not all, of the risk of uncertainty on the underwriter, and it contemplates the occurrence of wartime events and circumstances. Here, the insurance was taken out at the end of November 1941, when the risk was substantially increased by virtue of world conditions. It was not known then whether the existing tensions between the United States and Japan would erupt into hostilities while the *Portmar* was on the voyage. Further, it was unascertainable what direct impact war would have on the vessel if it did break out. For these reasons, petitioner was willing to pay the larger premium demanded for protection against the consequences of war as well as the perils of the sea. In these circumstances, it is appropriate to hold the underwriters for a longer period, after a governmental interruption, than would be true in the case of a charter. Having accepted the war risk premium, respondents cannot argue with persuasive force, as can the parties to a charter, that an event which is a direct result of war can sharply cut off all contractual rights and obligations. The

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of assistance on the point, it is uncertain whether the master could have obtained new coverage in Brisbane before the vessel departed. Petitioner, in New York, certainly could not have taken the necessary steps to reinsure since it was not even aware that a restraint had been imposed, if, indeed, the operations were not within the terms of the charter.

risk of uncertainty rests more logically on the insurer. From the standpoint of petitioner as an insured, the *Partmar* remained in danger of loss after the interruption first took place on January 5; the situation at that time was fluid and indeterminate and it was unclear how long the interruption would really last; the legitimate expectations of petitioner were that insurance coverage continued.[34] During a period of uncertainty as to whether there was to be a long-term requisition, and until the situation could be clarified, the insurance should protect against loss as a result of war risk.

The short of the matter is that while we have no quarrel with the basic proposition that, in the absence of special provision in the policy, if a vessel covered by a voyage policy is requisitioned for a period beyond the voyage the owner must undertake to reinsure, we submit that the situation must bring home to the insured at the time that such a

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[34] In a comparable situation it has been said:

"* * * The court is obliged to put itself in the position of the actors, 'and not be ready to find that the course actually pursued was blameworthy because the results were unfortunate.' The Styria, 186 U.S. 1, 9 * * *. What the shipper had the right to demand of the carrier was, not infallibility, but the exercise of a reasoned judgment of the situation as it appeared at the moment; having regard to the rights of all concerned." *De La Rama SS Co.* v. *Ellis*, 149 F. 2d 61, 64 (C.A. 9). This Court had added in *The Styria* that what is expected "* * * of a master, when confronted with unexpected emergencies, is not an infallible but a deliberate and considered judgment. Mere good faith will not excuse him, if his decision turns out to have been wrong, but the result is not always a true criterion whether a man pursued a prudent course or not." 186 U.S. at pp. 9-10.

requisition has occurred.[35] And a reasonable opportunity must be afforded thereafter to obtain the new coverage that the changed circumstances necessitate. In this case, the Court of Appeals erred, we believe, in holding the insurance terminated on January 5, 1942. The court's position does not take account of the incidents as they were known to the master and his owner, as well as the unresolved nature of the situation during January and February 1942. The result is to require the insured to carry the burden of uncertainty for which it relied on its purchase of war risk insurance.

5. We add, briefly, a final factor which we believe should be given weight. From the standpoint of public policy it is undesirable to require or encourage owners of American vessels to resist governmental orders such as those involved here, on the ground or in the belief that their war risk insurance coverage will be ended if they agree to informal orders and "restraints". One effect of the Court of Appeals' rule is that owners and masters may tend to try to avoid compliance with day-to-day orders, or may insist on full-scale formal requisitions with definite time limits. No rule seems realistic which, in the face of the dependence of the national welfare on the merchant marine, in-

[35] It is of interest that the owner has never claimed that the developments at Brisbane constituted a termination of the charter and the substitution of a requisition, and that its practical construction at the time is inconsistent with the theory of an indubitable requisition accepted by the Court of Appeals.

hibits American flag vessels from speedily and amicably performing emergency missions, or tends to constrain a higgling attitude in the shipowner in emergencies when pecuniary considerations are least justifiable.

For these reasons, we suggest that the Court of Appeals erred in the general rule it declared and in holding the insurance terminated on January 5, 1942. The Court may desire to remand the case for consideration of the facts in the light of the preferred principles which we urge, or it may feel that it can itself hold the insurance to have been in force on February 19, 1942, the date of the claimed loss at Darwin. In either event, the case has to be remanded for consideration of other defenses which have not yet been passed upon by the Court of Appeals—unless, of course, this Court should also desire to pass upon these other points.[36]

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[36] Even if the insurance survived the events of January and February 1942, respondents are not liable on the claimed loss unless they assumed the risk of an enemy attack during a period of allied restraint. *Swan* v. *Union Insurance Co. of Md.*, 3 Wheat. 168; *New Orleans, T. & M. Ry. Co.* v. *Union Marine Ins. Co.*, 286 Fed. 32 (C.A. 5). Respondents contended below that the *Free of British Capture* rider warranted the insurance free of claims arising during such restraints unless the vessel was detained merely for inspection purposes. See fn. 6, *supra*, p. 24. The rider does not say so and its language does not suggest so limited an application. If, in spite of the canon *contra proferentes* (*cf. Stipcich* v. *Metropolitan Life Ins. Co.*, 277 U.S. 311; *McMaster* v. *New York Life Ins. Co.*, 183 U.S. 25; *Equitable Ins. Co.* v. *Hearne*, 20 Wall. 494), respondents prevail on this question, the fact that the insurance was in effect on February 19, 1942, will be of little practical significance. On the other hand, petitioner may be held to have

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION.

Statement.

On November 26 and 27, 1941, the petitioner, through its London broker, Thos. Stephens & Sons, Ltd., insured the *Portmar* with the respondent Underwriters in London, as a commercial cargo vessel, by war risk policies on hull, on a round voyage from a United States Pacific port to the Philippine Islands and return to the United States, for a premium of 1½% (Lloyd's Policy, reproduced on p. 71 of the Record, is one of the three similar policies in suit). The petitioner correctly describes the *Portmar* as an "American cargo steamship" (Petitioner's brief, p. 2).

For the sake of brevity, we do not repeat the movements of the vessel which are detailed in the opinion of the Court of Appeals. They are vividly plotted on the map, Petitioner's Exhibit 53, which is included in the separate volume of exhibits filed with this Court by the petitioner. A reduced scale photostatic copy of Exhibit 53 is attached to this brief, as an Appendix. We do emphasize, however, what the Court of Appeals found as facts, namely, that by the time the *Portmar* reached Sydney December 30, 1941, the Japanese had sunk the British Battleships "Repulse" and "Prince of Wales", and this, following upon the substantial annihilation of the United States Fleet at Pearl Harbor "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point and establish it for an air-naval fueling base" (R., p. 793); that Australia's "northern coasts at any rate were in the direst straits . . . and Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed" (R., p. 795); that when the *Portmar* reached Brisbane January 5, 1942, the United States Army took her over, discharged her cargo, sorted it and reloaded part of it together with new cargo, and sent her north to Port Darwin on the north coast of Australia, about 2,100 miles distant from Brisbane (R., pp. 793, 794), into the very waters from which she had been diverted for safety's sake; and that after a side trip from Port Darwin westward to Wyndham with 2,000 drums of high octane gasoline, the Army ordered her back to Port Darwin, and there loaded her with 300 to 400 officers and men of the 148th United States Field Artillery, field guns, ammunition supplies and a naval launch, and sent her from Port Darwin on February 15, 1942, as part of an extremely dangerous military expedition "to reinforce the defense of Koepang across the Timor Sea, north of Australia" (R., p. 794).

The *Portmar* was completely taken over by the United States Army at Brisbane January 5, 1942, regardless of her commercial commitments (R., p. 795), and was thereafter used solely as a unit of the Army's fighting forces in the prosecution of the war. She was kept by the Army in the northern waters of Australia continuously for one month from her arrival at Port Darwin January 19, 1942, until she was bombed at Port Darwin February 19, 1942. That employment and those movements were in no way part of, or connected with, the round trip commercial voyage on which she was insured by the respondent Underwriters.

On the above facts, the District Court found that the Army had taken over the *Portmar* completely for war purposes (R., fol. 2153), and had "prevented the homeward voyage and sent the *Portmar* on to Timor" (R., fol. 2238). The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her" (R., pp. 794, 796), and said "In the case at bar the requisition added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" (R., p. 801), and concluded its opinion with the words, "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R., p. 802).

There is no ground for granting certiorari.

1. *The decision of the Court of Appeals was unanimous, and petitioner's application for rehearing was denied.*

The decision of the Court of Appeals (R., pp. 792-802, reported at 197 F. (2) 795), dismissing the libel against respondent war risk underwriters on the hull of the *Portmar* was unanimous, and the petitioner's application to the Court of Appeals for rehearing was denied (R., p. 820).

2. *No similar cases pending.*

The petitioner does not claim that there are any other pending cases involving similar facts or law; and so far as we know, there are no other similar pending cases.

The "Free of British Capture" rider on the policies is quoted in full on page 20 of the petitioner's brief. But in its argument that losses from bombs and gunfire are covered *in all circumstances* after the vessel has been requisitioned (Petitioner's Brief, pp. 4, 11, 12, 22, 25), the petitioner omits the qualifying words of the rider, viz. **"losses otherwise covered by this policy"**. The Court of Appeals held that, even assuming the petitioner were right in its interpretation of the meaning of the "Free of British Capture" rider, "the policy was no longer in force when the loss occurred, the voyage having before then come to an end and the policy with it" (R., p. 793), and

> "All provisions of the policy must be read with that limitation ('the prescribed voyage') in mind; for they were ancillary and implementary to that purpose" (R., p. 798).

In any event the "Free of British Capture" clause, as worded in the policies involved in the present suit, is no longer in use. The petitioner's own broker testified that the wording of the rider involved in this suit was used on policies only from 1940 to 1945 (Grotefend R., fols. 792, 793).

3. *No conflict between Circuits.*

There is no conflict of decisions between the Courts of Appeals of the ten Circuits of the United States.

4. *The Court of Appeals' decision is not in conflict with any British or American decisions.*

The petitioner's claim that the decision of the Court of Appeals in this case is contrary to the decision of the

House of Lords in *Rickards* v. *Forestal Land, etc. Co., Ltd.* (1942), A. C. 50, is erroneous. The decision of the Court of Appeals in this case is in accord with that case, and with the law as stated by this Court in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 878, 401.

The *Rickards* case involved war risk insurance on British *cargo*, on German vessels which, on the outbreak of war, on orders of the German Government, abandoned their voyages and attempted to reach Germany. One vessel reached Germany. The other two were scuttled. The House of Lords in giving recovery to the assured cargo owners for loss from a war cause, pointed out that *cargo* insurance differs from hull insurance in that insurance on cargo insures not only physical safety of the goods but *the safety of the adventure* upon which they are embarked; whereas *hull* insurance on a vessel for a voyage merely insures the physical safety of the vessel *during* the voyage, not that the voyage will be completed. In *cargo* insurance, termination of the insured voyage short of its destination gives the cargo assured an immediate right to recover even for undamaged cargo as a Constructive Total Loss. It was so held also in *British & Foreign Marine Insurance Co.* v. *Sandy & Co.* (1916), 1 A. C. 650. See also Arnould "Marine Insurance" (13th Ed.) Sec. 222(a).

This distinction was clearly stated by their Lordships in the *Rickards* decision as follows:

By Viscount Maughan at page 69:

> "* * * in the case of a policy on goods in normal form the owner can claim either for loss of goods or for loss of adventure, *while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure.*" (Italics ours.)

and at pages 70, 71:

> "It is clear that the position of underwriters in regard to a policy on a ship is entirely different from

> that of the owner of merchandise. * * * It is now well-settled, contrary to the opinion of LORD MANSFIELD in *Milles* v. *Fletcher* (1779) 1 Doug. (K. B.) 231, that *the loss of the voyage has nothing to do with the loss of the ship.*" (Italics ours.)

By Lord Wright, at page 90:

> "The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. Lord Mansfield insisted on applying the same rule to an insurance on a ship, but this view was rejected, and it was said that the *loss of the voyage has nothing to do with the loss of the ship.* The ship is a vehicle employed in general trading, not wedded to any particular adventure." (Italics ours.)

Other vital differences between cargo insurance and hull insurance were pointed out by this Court in *Gulf Refining Company* v. *Atlantic Mutual Ins. Co.* (1929), 279 U. S. 708.

In *Bradlie* v. *Maryland Insurance Co.* (1838), 12 Pet. 378, this Court pointed out that, contrary to the law of insurance on *cargo* for a voyage, insurance on a *vessel* for a voyage does not insure completion of the voyage. Story, J., said at page 401:

> "This was expressly held by this Court, in the case of *Alexander* v. *The Baltimore Insurance Company,* 4 Cranch, R. 370, where it was decided that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship *and* the voyage, or as an undertaking *that she shall actually perform the voyage;* and, only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, *during* the voyage." (Italics ours.)

Arnould "Marine Insurance" (13th Ed.), at the end of §1104 points out that the above statement of law as to *hull*

insurance is the established law of both England and the United States.

The decision of the Court of Appeals in the present case is in accord with the decisions both of this Court and of the House of Lords.

5. *The "Frustration of Voyage" clause.*

As to a "Frustration of Voyage" clause in the policy, the *Rickards* case dealt with the effect of a policy warranty against "frustration of voyage". There was also a warranty against "frustration of voyage" in the *Portmar* policies. The petitioner (Brief, pp. 15, 16) states that it makes no claim based upon the loss or "frustration" of the insured voyage, and Judge Hand pointed out that it could not, inasmuch as the "frustration" clause "is limited to claims for losses of the voyage as such, not of the ship" (R., p. 798). The petitioner's claim is for physical damage to the *Portmar* sustained *after* termination of the insured voyage.

6. *The charter party is res inter alios acta, and its provisions are not part of the respondents' policies.*

Petitioner argues that the terms and provisions of its charter with the Government should be read into the respondents' policies (Brief, pp. 19-22). The policies do not refer to the charter, nor were respondents parties to the charter. This Court has said:

> "* * * the contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties." *Texas Company* v. *Hogarth S. Co.* (1920), 256 U. S. 619, 627.

7. *The "Held Covered" clause.* The "Held Covered" clause (usually called the "deviation clause"), referred to at pages 22/23 of the petitioner's brief provides:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required" (R., p. 714).

The District Court held (R., fol. 2253), and both parties agree (see Petitioner's Brief, p. 22), that that clause becomes operative only where there has been a *voluntary* deviation or change of voyage, and that it does *not* apply to the present case, where the vessel was taken over by sovereign authority.

Although the presence of the "Held Covered" clause is necessary to avoid automatic termination of the policy in case of a *voluntary* deviation or change of voyage, the petitioner argues (Brief, p. 23) that if there has been a deviation or change of voyage "under compulsion of sovereign control," the insurance coverage "should be held to continue in effect" as a matter of law, although there is no such provision in the insurance contract. There is no authority anywhere for the petitioner's contention, and to state it is its own refutation. The petitioner asks this Court to inject into the insurance contract an agreement by underwriters, which is not only not in the contract, but which no Court or text writer has ever suggested was *implied* in the contract.

Quite apart from the above, what happened to the *Portmar* was vastly different from a mere deviation from the insured voyage or a mere change of voyage. It was definitely the termination of the prescribed voyage. Such termination results independently of the assured's volition and knowledge. *Parkin* v. *Tunno*, (K. B. 1809), 11 East. 22; *Speyer* v. *N. Y. Ins. Co.*, (1808), 3 Johns. (N. Y.), 88; *Anderson* v. *Marten*, (1908), A. C. 334.

It was that the vessel was taken over by the United States Army at Brisbane, January 5, 1942, and was at that moment converted into a unit of the United States Military Forces, employed by the Army for over a month in the northern waters of Australia, where a Japanese invasion was expected, culminating in her being sent as a warship carrying troops, guns, ammunition and a landing launch on the dangerous military attempt to occupy the Port of Koepang which had already been bombed by the Japanese. The Court of Appeals rightly held that such a change in character and use of the *Portmar* was not within the coverage of the respondents' policies, and that the voyage on which the respondents insured the vessel had been terminated prior to the damage sustained by her.

8. Respondents' agreement on February 6, 1942 was limited to cover "this diversion", i. e. "to Australia on outward voyage."

As to the respondents' agreement to change the policy coverage from a round voyage to the Philippines and return, to a round voyage to Australia and return, the petitioner through its American broker, Mather, Ltd., cabled its London broker, Thos. Stephens, Ltd. on January 24, 1952:

> "PORTMAR DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO."
>
> (Exhibit 4, R. 586.)

That was all that respondents were told. Respondents' reply to petitioner's London broker is set forth in Stephens' letter to Mather reading:

"We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been *diverted to Australia on the outward voyage under Government orders.*

"We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. STEPHENS,
Director"

(Exhibit 5, R. 593.)

Respondents' agreement, stated in that letter, was not that respondents would cover the *Portmar* thereafter until further advice, but that respondents would cover "this diversion", i.e. a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The cases cited on pages 24, 25 of the petitioner's brief were all cited in the petitioner's brief in the Court of Appeals. They do not support the petitioner's argument. In most of them the deviation was *voluntary*, to avoid danger. In none of them was the vessel taken over by the Government for military use as in the case of the *Portmar*. Furthermore in none of them did the policy contain an express warranty against the cause which produced the deviation,—excepting *Aktiebolaget Bank* v. *American M. M. Ins. Co.* (*The Ada*) (1925), 241 N. Y. 197, which did contain a warranty against restraint or detainment by the British Government or their Allies, and which, on page 211, is irreconcilably contrary to the petitioner's contention.

9. *Petitioner seeks to bring up questions not decided by the Court of Appeals.*

Although the petition herein is limited to the alleged error of the Court of Appeals in holding "that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R., p. 802), the petitioner suggests, in a footnote (pp. 10, 11), that if the writ be granted, it will ask to be heard on other questions. If that be proper practice in this Court, and the writ is granted, then respondents should be entitled to have this Court decide all the other numerous issues which were argued in the Court of Appeals, but which the Court of Appeals did not find it necessary to decide, and did not decide.

10. *The petitioner has an adequate remedy against the United States.*

The petitioner has an adequate remedy against the United States, which took and used the *Portmar* in the winning of the war, and which on November 17, 1942 requisitioned title to the *Portmar* in her partially repaired condition at Brisbane under Section 902 of the Merchant Marine Act, 1936 (R., p. 796; see Certificate of Requisition, R., fols. 1873, 1874).

Conclusion.

No valid ground has been shown for granting a writ of certiorari in this case, and the petition therefor should be denied.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents.

Dated New York, September 25, 1952.

Appendix.

Photostatic Copy of Map, Petitioner's Exhibit 53, Showing the Originally Ordered Course of the *Portmar* (for the Philippines) in Dotted Line; and the Actual Movements of the *Portmar* in Solid Line.

(Opposite ☞)

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MEMORANDUM FOR THE RESPONDENTS IN REPLY TO *AMICUS CURIAE* MEMORANDUM OF THE UNITED STATES.

The Acting Solicitor General's Memorandum as *amicus curiae* urges review of this case, alleging that "The United States is financially interested in the outcome." (Brief, p. 2.) This allegation is not correct. The petitioner's suit against respondent underwriters in this case is under hull voyage insurance policies on the *Portmar*. The petitioner's suit against the United States in Case 262 is for breach of the terms of the charter party of the *Portmar*, which was chartered by the petitioner as owner to the United States as charterer. The charter is not referred to anywhere in the respondents' policies (R., p. 71). The petitioner also has pending against the United States in the Court of Claims a proceeding (No. 48,509) to recover for the

PACIFIC OCEAN

AND THE BAY OF BENGAL

Compiled and Drawn in the Cartographic Section of The National Geographic Society for

THE NATIONAL GEOGRAPHIC MAGAZINE

Gilbert Grosvenor, Editor

Scale 1:23,500,000 or 434 miles to the inch at the Equator

Mercator Projection

International Boundaries as of September, 1, 1939 the day Germany invaded Poland

James M. Darley, Chief Cartographer; Culture by Appbia E. Holdstock and Donald G. Bouma; Physiography by John J. Brohm

Washington

September, 1943

(P. 13)

damage sustained by the *Portmar*, and also for "just compensation" for the requisition of title to the *Portmar* (in her partially repaired condition at Brisbane November 17, 1942) by the United States under Section 902 of the Merchant Marine Act, 1916 (R., pp. 703, 803, 513).

If respondent underwriters had been held liable to the petitioner in this case, they would then have been subrogated in full to all the rights of the petitioner against the United States in the Court of Claims proceeding. *United States* v. *American Tobacco Company* (1896) 166 U. S. 468; Rules of the Court of Claims, Rule 25(c). It can, therefore, make no difference to the United States whether its liability to the petitioner is for the petitioner's own account, or for account of subrogated hull underwriters, if, contrary to the Court of Appeals' decision, hull underwriters were to be held liable to the petitioner in this case.

The United States is not mentioned in the respondents' policies (R., p. 71), and is not an assured under those policies. That the United States paid the premium for the insurance, as stated on page 2 of the *amicus curiae* memorandum, is immaterial. It is settled law that the charterer who has, by its own acts, brought about damage to the insured vessel is liable to the vessel's hull insurer who has paid for such loss under its policy,—even though the charterer had paid the insurance premium. *White* v. *Upper Hudson Stone Co.* (1917 C. C. A. 2 C.) 248 Fed. 893, *cert. den.* 246 U. S. 665, and *Kennelly* v. *Frederick Starr Contracting Co.* (1918 C. C. A. 2 C.) 250 Fed. 229.

Both the District Court (R., p. 747) and the Court of Appeals (R., pp. 794, 796) found as a fact that the United States had taken over the *Portmar* and prevented her homeward voyage, prior to the damage sustained by her. The only question before this Court on the petition for certiorari is the correctness of the Court of Appeals' decision

that the breakup and termination of the insured voyage also terminated the voyage policies on hull (R., p. 802).

As pointed out on page 6 of our brief in opposition to the petition for certiorari in this case, this Court, in *Bradlie* v. *Maryland Insurance Co.* (1938), 12 Pet. 378, 401, held that hull insurance does not insure completion of the insured voyage. That holding has never since been questioned. The holding of the Court of Appeals is likewise in accord with the law as stated in 1867 by the leading American marine insurance text writer:

> "The risk ends when the voyage is intercepted and broken up, although it is by a peril not insured against." *Phillips on Insurance* (5th Ed.), Sec. 967.

It is likewise in accord with the law in England as to *hull* insurance as stated in *Rickards* v. *Forestal* (1942), A. C. 50 at pages 69, 70, 71 and 90, as quoted at pages 5 and 6 of our brief in opposition to the petition for certiorari.

There are no decisions to the contrary.

There are, therefore, contrary to the Government's Memorandum, no important questions of Federal law requiring review by this Court.

Conclusion.

Neither the petition for certiorari nor the Acting Solicitor General's Memorandum as *amicus curiae* states any valid ground for granting a writ of certiorari in this case, No. 303, and the petition for certiorari should be denied.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents.

Dated New York, October 7, 1952.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

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MEMORANDUM FOR THE RESPONDENTS IN REPLY TO *AMICUS CURIAE* MEMORANDUM OF THE UNITED STATES.

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IN THE

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Petitioner,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF.

Statement.

This case is before this Court on a writ of certiorari to the United States Court of Appeals for the Second Circuit to review the unanimous decision of that Court, which dismissed the libel (197 F. 2d 795, R. 792-802).

Except that this case and *Calmar Steamship Corporation* v. *United States* (Docket 262) were tried on the same record, the two cases have nothing in common. The issues are entirely different.

In this case the basic question is whether the respondents' war risk policies covering the *Portmar* on a commer-

cial round trip voyage from United States to the Philippines (subsequently changed by agreement to round trip voyage from United States to Australia) still covered the *Portmar* on February 16 and 19, 1942, when she was damaged by bombs and gunfire from Japanese war planes in the Timor Sea and at Port Darwin, while under requisition by the United States Army, and while being used on a *military expedition* in an active war area where Japanese attack was momentarily expected.

The District Court found that the Army had taken over the *Portmar* completely for war purposes (R. 718), and had "prevented the homeward voyage" and sent the *Portmar* on to Timor (R. 747). The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her." (R. 794) and held:

> "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

On November 26 and 27, 1941, the petitioner, through its London broker, Thos. Stephens & Sons, Ltd., insured the *Portmar* with the respondent Underwriters in London, as a commercial cargo vessel, by war risk policies on hull, on a round voyage from a United States Pacific port to the Philippine Islands and return to the United States, for a premium of 1½% (Lloyd's Policy, reproduced on p. 71 of the Record, is one of the three similar policies in suit). The petitioner correctly describes the *Portmar* as "a cargo vessel" (Brief, p. 2).

For the sake of brevity, we do not repeat the movements of the vessel which are detailed in the opinion of the Court

of Appeals. They are vividly plotted on the map, Petitioner's Exhibit 53, which is included in the separate volume of exhibits filed with this Court by the petitioner. A photostatic copy of Exhibit 53 is attached to this brief, as an Appendix. We do emphasize, however, what the Court of Appeals found as facts, namely; that by the time the *Portmar* reached Sydney December 30, 1941, the Japanese had sunk the British Battleships "Repulse" and "Prince of Wales", and this, following upon the substantial annihilation of the United States Fleet at Pearl Harbor "gave the Japanese full battle fleet command of the Pacific" and a "naval superiority which enabled them to transport troops to almost any desired point and establish it for an air-naval fueling base" (R. 793); that Australia's "northern coasts at any rate were in the direst straits * * * and Japanese carriers could range about unobstructed; and Japanese forces might land where they would, substantially unopposed" (R. 795); that when the *Portmar* reached Brisbane January 5, 1942, the United States Army took her over, discharged her cargo, sorted it and reloaded part of it together with new cargo, and sent her north to Port Darwin on the north coast of Australia, about 2,100 miles distant from Brisbane (R. 793, 794), into the very waters from which she had been diverted for safety's sake; and that after a side trip from Port Darwin westward to Wyndham with 2,000 drums of high octane gasoline, the Army ordered her back to Port Darwin, and there loaded her with 300 to 400 officers and men of the 148th United States Field Artillery, field guns, ammunition, supplies and a naval launch, and sent her from Port Darwin on February 15, 1942, as part of an extremely dangerous "military expedition" "to reinforce the defense of Koepang across the Timor Sea, north of Australia" (R. 794).

The degree of danger to the *Portmar* on that "military expedition" is clear from the fact that it was common knowledge in Darwin that an Empire Airways flying boat had been destroyed by enemy action en route from Darwin to Koepang on January 29, 1942 and that Japanese war planes had bombed Koepang on February 1, 1942 (R. 405, 406, 1943 World Almanac, 61), and was vividly described by the Commander of the Cruiser *Houston* when he briefed Captain Michelson of the *Portmar* on board the cruiser on the night of February 14, 1942, as testified by Captain Michelson himself, as follows:

> "Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said 'Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor, I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can' " (Michelson, R. 405).

The *Portmar* was completely taken over by the United States Army at Brisbane January 5, 1942, regardless of her commercial commitments (R. 795), and was thereafter used solely as a unit of the Army's fighting forces in the prosecution of the war. She was kept by the Army in the northern waters of Australia continuously for one month from her arrival at Port Darwin January 19, 1942 until she was bombed at Port Darwin February 19, 1942, while the troops, the guns and ammunition were still on board (R. 325, 348, 479, 724, 725). That employment and those movements were in no way part of, or connected with, the round trip commercial voyage on which she was insured by the respondent underwriters.

There is no substantial dispute as to the facts. Even "the costs of all damage repairs necessary to restore the

Portmar to the condition she was in prior to being bombed" were fixed at £28,000 Australian currency ($91,000) by a joint survey made and signed by representatives of petitioner, United States and respondents. (R. 651). What happened on the voyage and in Australia appears entirely from the testimony of petitioner's own witnesses, taken prior to trial, and of Government witnesses given at the trial—in particular, Col. Thomas G. Plant, Chief of the United States Army's Water Transportation in the Southwest Pacific Area. Respondents had no representatives in Australia except the two surveyors appointed to participate in the joint survey above mentioned.

The contention of the Government in its Memorandum as *amicus curiae* that "The United States is financially interested in the outcome of this suit" (p. 2), is not correct. The petitioner's suit against respondent underwriters in this case is under hull voyage insurance policies on the *Portmar*. The petitioner's suit against the United States in Case 262 is for breach of the terms of the charter party of the *Portmar*, which was chartered by the petitioner as owner to the United States as charterer. The charter is not referred to anywhere in the respondents' policies (R. 71), and the petitioner so admits (Brief, p. 21). There is no evidence that the respondents even knew the *Portmar* was under charter. The petitioner also has pending against the United States in the Court of Claims a proceeding (No. 48,509) to recover for the damage sustained by the *Portmar*, and also for "just compensation" for the requisition of title to the *Portmar* (in her partially repaired condition at Brisbane November 17, 1942) by the United States under Section 902 of the Merchant Marine Act, 1936; 46 U. S. C. 1242 (R. 703, 803, 513).

If respondent underwriters had been held liable to the petitioner in this case, they would then have been subro-

gated in full to all the rights of the petitioner against the United States in the Court of Claims proceeding. *United States* v. *American Tobacco Company* (1896), 166 U. S. 468; Rules of the Court of Claims, Rule 25 (c). It can, therefore, make no difference to the United States whether its liability to the petitioner is for the petitioner's own account, or for account of subrogated hull underwriters, if, contrary to the Court of Appeals' decision, hull underwriters were to be held liable to the petitioner in this case.

The United States is not mentioned in the respondents' policies (R. 71), and is not an assured under those policies. That the United States paid the premium for the insurance, as stated on page 2 of the *amicus curiae* memorandum, is immaterial. It is settled law that the charterer who has, by its own acts, brought about damage to the insured vessel is liable to the vessel's hull insurer who has paid for such loss under its policy,—even though the charterer had paid the insurance premium. *White* v. *Upper Hudson Stone Co.* (1917 C. C. A. 2C.), 248 Fed. 893, cert. den. 246 U. S. 665, and *Kennelly* v. *Frederick Starr Contracting Co.* (1918 C. C. A. 2C.), 250 Fed 229.

Petitioner's Assignments of Error in the present proceeding.

In order to narrow the scope of the argument, respondents herewith submit as to each of the petitioner's six alleged errors *(Brief,* pp. 14, 15) a summary sentence indicating respondents' position as to each, and referring to the place in this brief where each is discussed.

1. Petitioner complains that even though the round voyage of the *Portmar* was frustrated, the policies did not thereupon terminate.

Reply: When an insured voyage ends, hull policies insuring the vessel on such voyage end. Discussed, pp. 18-20.

2. Petitioner complains that the declared intent of the parties (presumably petitioner and respondents), as shown by the policy provisions, were not enforced.

Reply: All provisions of the policies relating to breakup of the voyage and resultant termination of the insurance, were given due effect. Discussed, pp. 33-45.

3. Petitioner complains that respondents were released from "liability by an implication of an intent not to cover the loss which occurred".

Reply: The Court of Appeals held that the voyage (and with it, the insurance) had terminated prior to the loss (R. 793). It was correctly held that coverage on a merchant vessel ceases when the vessel was devoted to indeterminate service in an active war area, and was completely outside the scope of commercial service (R. 801-2). Discussed, pp. 33-45.

4. Petitioner complains that the principles stated in the *Rickards* decision of the House of Lords were not applied to the present controversy.

Reply: The *Rickards* case involved cargo insurance, not hull insurance, and the House of Lords in that case pointed out that, differing from cargo insurance, hull insurance does not insure that the vessel shall complete the insured voyage. Furthermore, the policies in the *Rickards* case did not contain an exclusion clause equivalent to the Free of British Capture Clause of the *Portmar* policies. The *Rickards* case and the decision of the Court of Appeals in the present case are in complete harmony. Discussed, pp. 50-55.

5. Petitioner complains that respondents' agreement to substitute "Australia" for the "Philippines" was not given any effect.

Reply: The Court of Appeals described the "prescribed voyage" as "a round voyage from San Francisco to Australia and Philadelphia" (R. 801), thus giving full effect to the amendment. Discussed, pp. 30-33.

6. Petitioner complains that the voyage was held to have been broken up before the loss occurred.

Reply: As shown in the first three points of this brief, the insured voyage was in fact broken up, not only on the specific grounds stated by the Court of Appeals but in other respects which the Court found it unnecessary to consider. Discussed, pp. 8-69.

FIRST POINT.

The Court of Appeals correctly held that the insured voyage and the policies terminated prior to the *Portmar's* damage.

The record establishes the *fact* that from and after the time the Army took over the *Portmar* completely at Brisbane, January 5-9, 1942, there was no longer any reasonable prospect of her continuing the insured round voyage. After the *Portmar* had been diverted to Suva and thence to Southern Australia *for safety*, and had arrived at Sydney on December 30, 1941, she was sent north 529 nautical miles to Brisbane. There, under orders of the United States Army, her cargo was discharged and sorted on the dock. Under United States Army orders part of her original cargo and, in addition, cargo from other vessels that had arrived at Brisbane were laden on the *Portmar*

(R. 285-7, 404, 455, 719) and she sailed north from Brisbane on January 9, 1942 right back into the waters from which she had been diverted for safety, proceeding a further distance of 2,097 nautical miles [according to the "Table of Distances between Ports" published by the Hydrographic Office of the United States Navy Department] through Torres Strait and thence westerly to Port Darwin (R. 287, 455-6, 719). It is beyond question, and was insisted upon at the trial by the petitioner, that on and after January 5, 1942, when the *Portmar* arrived at Brisbane, every order and direction given to the master and every movement of the vessel was related solely to the prosecution of the war. No prospect of the vessel's completing a return voyage to the United States within the foreseeable future, either with or without cargo, existed.

In his opening statement to the District Court, the attorney for the Government stated:

> "The situation in Australia at that time was critical. We intend to show just how critical it was. The Japanese were at the point of their greatest expansion. The Navy had withdrawn from the waters north around Port Darwin, invasion was momentarily expected, the islands of the East Indies were under Japanese attack, Japanese invasion, and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated. They were not inquiring into whether the United States was the charterer, or the property belonged to X, Y or Z. They were finding out what ships were in Australian waters, what material was available to the armed forces of the United States and of Australia to meet the Japanese threat, and were ordering that material sent where it was needed most.

"After the Army learned of the nature of the *Portmar's* cargo, after it had been given details as to the *Portmar's* characteristics and so forth, the Army gave military orders, which the master received in Brisbane, to have the material taken off the vessel, sorted, accurately appraised for usefulness, and gave other orders which caused a good deal of it to be reloaded together with certain other cargo, and the material sent up to Port Darwin where the invasion was expected" (R. 101-2).

The testimony of Colonel Thomas G. Plant, the United States Army's Chief of Water Transportation in the Southwest Pacific area (R. 183), gives the facts on which the Government's opening statement was based.

Colonel Plant testified that he arrived in Australia the end of March, 1942 (R. 183), and that his initial job was "to discharge ships that were there, sort out their cargo, find out what they had, and to find out where they could be used to the best advantage" (R. 185), and "the procurement and assignment of all vessels on all military and supply missions. • • • every vessel we could get our hands on" (R. 186).

"Australia's life depends on coastal shipping and they were desperate for covering their own needs, so we had very few Australian vessels we could depend upon. Some 21 small Dutch vessels had escaped when the Dutch East Indies were seized by the Japanese, and some of those were heavily bombed and damaged. We got those and repaired those. In the meantime, we were looking around desperately for anything that was afloat or could be made to float" (R. 186-7).

and

"Q. Did it make any difference with respect to the control which you exercised over vessels at that

time whether or not they were owned or chartered to the United States or any government? A. None whatsoever.

"Q. In making decisions with respect to dispatching vessels to various points did you regard commercial considerations of any sort? A. No, sir, military only.

"I was given very complete authority in Washington to take any ship in Australia and to do what we pleased with it" (R. 187, 188).

Col. Plant testified that the United States Army Transportation Service had exercised the same authority and control from very shortly after December 7, 1941, when many ships had been diverted to Australian ports (R. 188).

The dire situation which confronted the Army in Australia at that time is vividly recorded by Prime Minister Winston S. Churchill in his volume "The Grand Alliance" (1950). At page 614, he states that on the night of December 9, 1941 he convened a meeting of the British Admiralty in the Cabinet War Room "to review the naval position", and adds:

> "We had lost the command of every ocean except the Atlantic. Australia and New Zealand and all the vital islands in their sphere were open to attack."

That was the day before the *Prince of Wales* and the *Repulse* were sunk (id., pp. 618, 619). Referring to their loss he says at page 620:

> "There were no British or American naval ships in the Indian Ocean or the Pacific except the American survivors of Pearl Harbor, who were hastening back to California. Over all this vast expanse of waters, Japan was supreme and we everywhere weak and naked."

On December 10, 1941 the Prime Minister wirelessed to Mr. Eden (at sea):

> "United States have now only two battleships effective in Pacific against ten Japanese. * * * According to American sources, we are going to be heavily attacked in Malaya and throughout the Far East by Japanese enjoying command of the sea."

On December 12, he wirelessed Mr. Eden (at sea):

> "The loss of the *Prince of Wales* and *Repulse*, together with United States losses at Pearl Harbor, gives Japanese full battle fleet command of Pacific. They can attack with any force overseas at any point" (p. 624).

On December 20, 1941 he wrote, in Washington:

> "The Japanese have naval superiority which enables them to transport troops to almost any desired point, possess themselves of it, and establish it for an air-naval fueling base" (p. 652).

The NEW YORK TIMES of December 13, 1941, page 5, contains a United Press dispatch from Melbourne, Australia, dated December 12, which reads in part:

> "Workers were digging trenches in the parks of Sydney and building pill-box defense posts in the streets of Brisbane today as Australia made ready to meet any Japanese invasion."

The NEW YORK TIMES of December 17, 1941, page 8, contains a wireless dispatch from Canberra, Australia, dated December 16, which states:

> "The War Cabinet also directed the evacuation of all woman and children from Darwin, except women in essential services."

That was more than three weeks before the Army sent the *Portmar* from Brisbane north to Port Darwin.

Captain Michelson corroborated the foregoing. Speaking of conditions at Sydney at the end of December, 1941, he said that the waters had been mined, that German raiders had sunk a lot of British vessels, and that the Japanese were very much complete masters of the ocean routes and in control of the seas north of Australia. The Australian Naval vessels were afraid to even approach the *Portmar* on her arrival at Sydney in December 1941 because of a suspicion that, in spite of prominent American marking, it was an enemy vessel. By the time the *Portmar* had reached Brisbane on January 5, 1942, Captain Michelson knew that the situation north of Australia had noticeably deteriorated (R. 519-22, 526).

That the United States Army did not intend to allow the *Portmar* to complete her round-trip commercial voyage, is further established by the fact that, even after she was damaged, when Captain Williams, then head of his own private salvage company (R. 684, 694) told Colonel Plant he had salvaged the artillery from the *Portmar* and that he was sure he could raise the vessel, Colonel Plant ordered him to "Get it afloat" (R. 188, 189, 198); and when Captain Williams reported to Colonel Plant that the *Portmar* was afloat, Colonel Plant made arrangements with Captain Williams to have the vessel towed to Brisbane (R. 189, 191), because she was still useful "to the Army" if she could be taken to a place for repair (R. 193).

When the *Portmar* arrived back at Brisbane in July 1942, the Army maintained exclusive control of the vessel and made temporary repairs by Army personnel and some local mechanics, with materials taken from the wreck of another vessel and a scrap pile in the shipyard. Captain

Michelson was not allowed to board the vessel until he got written permits from both the United States Army and the salvor, Captain Williams (R. 195, 201, 211, 737, 770).

United States Army Captain Haggett, in charge of repairs at Brisbane, commenced that work "early in September" (R. 201), two months before the Government took title to the vessel on November 17, 1942, and his orders "were to do only what would permit the vessel to be operated in Australian waters during the war" (R. 201, 268).

From Brisbane the Army took the *Portmar* to Sydney under her own power for drydocking and further repairs, and on completion of the Sydney repairs, the Army put the *Portmar* back into commission, and used her on two or three trips until she was torpedoed and sunk while carrying cargo for the Army (R. 196).

It is clear from the above that when the United States Army took the vessel over at Brisbane January 5, 1942, and converted her into an Army vessel for use in the prosecution of the war, there was no longer any possibility of her completing the commercial round voyage. That voyage and the insurance covering that voyage were then and there broken up and terminated.

In Conclusions of Law, the District Court held:

> "The insured voyage was never voluntarily abandoned or terminated by libellant, the *Portmar* or her master. * * * It was only because of the intervention of a sovereign that the return voyage was not commenced. * * * It was the act of paramount power which *prevented the homeward voyage* and sent the *Portmar* on to Timor" (R. 746-7). (Italics ours.)

The Court of Appeals held:

> "* * * we hold that the policy was no longer in force when the loss occurred, the insured voyage having

before then come to an end and the policy with it" (R. 793).

and again:

"* * * we hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

The testimony amply sustains the *fact* that the *Portmar's* round-trip commercial voyage, which was what the respondents insured, was broken up when the United States Army took her over completely for use solely in the prosecution of the war, at Brisbane, between January 5 and 9, 1942.

A vessel's voyage is broken up when her movements cease to be within the voyage described in the contract. This has been held as to all the vessel's relationships, viz. in cases involving crew contracts, time charters, contracts of affreightment and insurance contracts.

In a case involving a claim by a seaman's wife under an allotment slip for wages arising after his vessel, the *Coralie Horlock*, had been detained at the port of Hamburg by German authorities on August 4, 1914 when the First World War broke out, the House of Lords, after extended analyses of many frustration decisions, held that such detention *for an unpredictable period*, operated to *terminate the voyage and the ship's contract to pay wages, immediately* and before the date for termination specified in the ship's articles. *Horlock* v. *Beal* (1916) 1 A. C. 486; 13 Asp. M. C. 250.

In *Borup* v. *Western Operating Corporation* (1942, 2 Cir.) 130 F. 2d 381; Cert. Den. 317 U. S. 672, it was held that where a round voyage is prevented by act of Government for a period which, even though not perpetual, is at that moment of *indefinite duration*, i.e. more than a short

temporary interruption, the voyage is in law broken up and terminated. In that suit, a libel by Norwegian members of the crew of an American whaling ship sought to recover wages which by contract between shipowner and crew were to continue "under all circumstances until the crew's arrival at the place of signing on". The voyage was from Sandefjord, Norway, where the crew signed on, to the Antarctic and return to Sandefjord. By Presidential Neutrality Proclamation of April 10, 1940, while the ship was on the return trip to Norway, she was prohibited from returning to Norway, and therefore put into an American port. The Court of Appeals held that *both the round voyage with return to Sandefjord, and the wage contract for that voyage,* were terminated by the United States Government's act, which was then obviously of indefinite duration. As Judge Hand said, the prevention, though not perpetual, "was not likely to change" (p. 386).

Likewise in the case of time charters, such as Judge Learned Hand analyzed in the present Court of Appeals' decision (R. pp. 799-800), those charters have been held frustrated and terminated when continued performance has been rendered impracticable or impossible because of governmental restraint of indefinite extent which was likely to outlast the charter term.

In *The Claveresk* (1920, 2 Cir.) 264 F. 276 [approved in *Omnia Commercial Co. v. United States* (1922) 261 U. S. 502, 512], where the British Government requisitioned a British vessel, the Court held that the time charter was terminated although it had fourteen months to run until expiration date, saying

> "In the present instance, what ceased to exist was Sutherland's (the owner's) control of the *Claveresk;* that swept away the foundation of contract, as might a fire or shipwreck." (264 F. 283-4)

So also in *Allanwilde Corporation* v. *Vacuum Oil Co.* (1918) 248 U. S. 377, which brought before this Court four certified questions relating to the frustration of a contract *voyage* resulting from a United States Government embargo against the departure of sailing vessels during the First World War. The vessel *Allanwilde* loaded her contract cargo and, in accordance with the contract of affreightment sailed from New York for European ports. After she had proceeded about 500 miles, the vessel encountered a storm and was forced to return to New York for repair. When the repairs were completed, clearance was refused. In holding both the voyage and the contract of affreightment terminated, this Court said (p. 386):

> "And it is further urged that such embargo was at most but a temporary impediment and the cargo should have been retained until the impediment was removed, or transported in a vessel not subject to it. We cannot concur in either contention. *The duration was of indefinite extent.* Necessarily the embargo would be continued as long as the cause of its imposition,—that is, the submarine menace,—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation." (Italics ours)

Likewise in *Texas Company* v. *Hogarth Shipping Company* (1921), 256 U. S. 619, this Court held that a *voyage charter* was frustrated, even before the voyage commenced, because the ship had been requisitioned. The principle involved is illustrated in the numerous citations in this Court's opinion in the *Texas Company* case at p. 630.

Lord Sumner, writing for the Judicial Committee of the Privy Council, in *Hirji Mulji* v. *Cheong Yue S. Co.* (1926) A. C. 497; 17 Asp. M. C. 8, said:

"Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, its legal effect does not depend on their intention, or their opinions or even knowledge, as to the event, which has brought this about, but on its occurrence under such circumstances as show it to be inconsistent with further prosecution of the adventure. Sometimes the event is such as to speak for itself, like the outbreak of war on the 4th August, 1914, in *Horlock* v. *Beal* (1916) 1 A. C. at p. 528. Sometimes the frustration is evident when the gravity and the circumstances of the breakdown can be known, as in *Bensaude's case* (1897) A. C. 609; 8 Asp. M. C. 315; *sometimes as in the case of requisition, when it can be known that in all reasonable probability the delay will be prolonged and fortiorari when it has continued so long as to defeat the adventure. Frustration is then complete. It operates automatically.*" (Italics ours)

The law is the same as to insurance contracts. In *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88, where a cargo policy contained a warranty against being turned away from Bordeaux, the destination of the insured voyage, and the vessel was turned away by the French Government, Chancellor Kent, referring to that warranty, said at page 94:

"The plaintiff assumed the risk of such a peril upon himself. * * * The defendant cannot be responsible for subsequent events. The risk terminated at Bordeaux, for the policy did not provide for a continuation of risk, in case of a prohiblton to enter, founded on an illicit trade, nor for leave for the plaintiff to go elsewhere. The prohibition to enter, under the special provision in the policy, was equivalent to an actual termination of the risk, by the landing of the goods. The policy had completely spent itself, when the prohibition intervened."

And in *Marshall* v. *Delaware Ins. Co.* (1808) 4 Cranch. 202, it was said of an insured voyage:

> "But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage." (p. 207).

The very decision on which petitioner based its application for the present writ, *Rickards* v. *Forestal, etc. Co.* [1942] A. C. 50, 111, specifically held that the voyages of the three German vessels (carrying the insured cargo) were terminated when restraint by the German Government compelled the masters to depart from the insured voyages.

A Voyage Policy on a vessel is only coextensive with the voyage as described in the policy. Arnould, Marine Insurance (13th Ed.) Sec. 370 states:

> "* * * for it is an elementary principle in this branch of insurance law that the underwriter cannot be liable for a loss which does not take place in the course of prosecuting the very voyage described in the policy."

The law in the United States is the same. In *Audenreid* v. *Mercantile Mut. Ins. Co.* (1875) 60 N. Y. 482, 485-6, the New York Court of Appeals said:

> "In an insurance upon a specific voyage the commencement and termination are given, * * *. If the insured may break up a single voyage between the termini named in the policy, at his own pleasure or for his profit or convenience, into several, by stopping at intermediate ports, he may essentially vary the risk, and the estimate of the underwriter will be of no value." (p. 485)
>
> "In the absence of any usage or stipulation to the contrary, the meaning of the parties to the policy is

> that the ship shall proceed from one terminus of the voyage insured, to the other, in a direct course, with all due expedition and without touching at any interjacent port, or pursuing any intermediate adventure." (p. 486).

In *Northwestern SS. Co., Ltd.* v. *Maritime Ins. Co., Ltd.* (1908 C. C. W. D. Wash.) 161 F. 166, 178, the Court said:

> "A policy insuring a ship for a voyage insures only for the particular voyage intended, which must be prosecuted with diligence and by the most direct and practicable known route."

If the insured voyage is prematurely terminated, the insurance coverage is also terminated. Phillips on Insurance (5th Ed.) Sec. 967, states:

> "The risk ends when the voyage is intercepted and broken up, although it is by a peril not insured against."

The Insured Voyage of the *Portmar*.

The "prescribed voyage" or the "insured voyage" of the *Portmar* is clear. The original "insured voyage" was a round voyage to the Philippines and return. On January 24, 1942, the petitioner through its American broker, Mather & Co., cabled its London broker, Thos. Stephens, Ltd.:

> "*PORTMAR* DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS. STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO."

(Exhibit 4, R. 586.)

That was all that respondents were told. Respondents' reply to petitioner's London broker is set forth in Stephens' letter to Mather reading:

> "We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. Pacific ports to the Philippines and return to U. S. has been *diverted to Australia on the outward voyage under Government orders.*
>
> We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)
>
> Yours truly,
>
> Thos. Stephens & Sons, Ltd.
>
> H. Stephens,
> Director"
>
> (Exhibit 5, R. 593.)

Respondents' agreement, stated in that letter, was not that respondents would cover the *Portmar* everywhere until further advice, but that respondents would cover "this diversion", i.e. a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The District Court held:

> "The policies in suit were written for a round voyage. The cable of the underwriters changed and modified the coverage only to the extent of changing the port of destination on the outward voyage 'to Australia' instead of 'to the Philippines'" (R. 744).

The Court of Appeals held the same, describing the "prescribed voyage" as "from San Francisco to Australia and Philadelphia" (R. 801).

(The petitioner's brief refers to the above agreed amendment of the "insured voyage" as a "special 'held covered' agreement". It should not, however, be confused with the printed clause in the policy referring to Deviation, which both parties agree applies only to a *voluntary* deviation or change of voyage [Petitioner's Brief p. 27], and which has been referred to throughout the present litigation as the "held covered" clause.)

The Policy Warranty against Claims Arising from Restraint, Detainment and Requisition.

The *Portmar* policies contained a "Free of British Capture" rider marked "B. C. 2", an American rider printed and affixed to the policies by the petitioner's American broker prior to their being sent to London for signature by the respondents (R. 263, 264). Under the first clause of that rider restraint, detainment and requisition by Great Britain or any of her Allies are excluded from the coverage (that the last half of that rider and the movements of the *Portmar* do not take this case out from that warranty, is discussed fully *infra* at pp. 33-45 of this brief, where the entire rider is analyzed and discussed as a whole). There can be no reasonable doubt as to the meaning and effect of the first part of that rider. The witness Winter, whose qualifications were readily conceded (R. 245), and whom petitioner has quoted herein as an authority (R. 812-3), stated that those words constituted an absolute exclusion and freed underwriters of any responsibility for restraints by Allied powers (R. 249). The District Court agreed with that view (R. 250). Those views are in complete agreement with reported decisions. Where a policy warranty excludes a

risk, the assured himself assumes that risk. *Aktiebolaget M. Bank* v. *American M. M. Ins. Co. (The Ada)* (1925) 241 N. Y. 197, 211; *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88; *Graham* v. *Pennsylvania Ins. Co.* (1807) F. Cas. 5,674, 2 Wash. C. C. 113, 120. There is not a single judicial decision to the contrary. Nor has the petitioner cited a single decision holding that where a voyage (round-trip or otherwise) has been broken up by an *excluded* peril, the insurance was thereby extended for any purpose, or liability decreed thereunder against underwriters.

In *Standard Oil Co.* v. *United States (The Llama)* (1925) 267 U. S. 76, which concerned *hull* insurance on the *Llama* against war risks, the vessel on a voyage from New York to Copenhagen was stopped by a British warship, and ordered to Kirkwall. While so proceeding, she struck a rock and was totally lost. This Court held that the loss was from a war risk, not a marine risk, and said at page 78:

> "Whatever happens *while the taking insured against continues,* fairly may be attributed to the taking. That is a non-conductor between the assured and subsequent events. See *Muller* v. *Globe & Rutgers Fire Insurance Co.,* 246 Fed. 759, 763." (Italics ours.)

Anderson v. *Marten* [1908] A. C. 334, in the House of Lords, completes the picture. In that case, suit was against marine underwriters to recover for stranding and wreck of a vessel which had been arrested and sent to Japan, and which stranded during that diversion. The House of Lords held that the loss was from capture, and because restraints were excluded from the policy by an express warranty, marine underwriters were not liable for stranding loss *during* the period of restraint—irrespective of whether the Japanese Prize Court after loss of the vessel condemned her or released her.

In the present case, the District Court correctly held:

> "The restraints under which the *Portmar* was operating were the proximate cause of the damage she sustained *Standard Oil Co.* v. *United States (The Llama)* (1925) 267 U. S. 76, 78" (R. 747, 748).

It is thus established by both this Court and the House of Lords that if restraint, etc. (by the Government of Great Britain or any of its Allies) are *excluded* from the policy coverage, then all damage sustained *during such restraint* is excluded. In *Aktiebolaget M. Bank* v. *American M. M. Ins. Co. (The Ada)* (1925), 241 N. Y. 197, a group of actions by the vessel owner against war risk underwriters for loss of the *Ada* by enemy torpedoes, the policies contained a clause which was in substantially the same language as the first portion of the "Free of British Capture" rider on the *Portmar* policies. It read:

> "Warranted free from any claim arising from capture, seizure, arrests, restraints, preemption or detainments by the British Government or their Allies" (241 N. Y. 204).

The insured voyage was "From New York to Gothenberg (Sweden), whilst there and return to United States Atlantic port or ports, direct or otherwise". On the return trip from Gothenberg the vessel was hailed by a British man-of-war and ordered into Stornoway, Scotland. From there she was ordered by the British authorities to proceed to Bristol, England, where she remained under the direction of the British Government until April 21, 1917. On that date the British authorities gave her permission to sail to New York, but she was unable to commence that voyage because of (by then) insufficient coal on board. The British authorities then agreed to furnish her sufficient

bunker coal to complete her voyage to New York, provided that she first discharge the cargo she had loaded at Gothenberg, carry a cargo from Bristol to Gothenberg and a return cargo to an English port. Under these circumstances the *Ada* discharged her cargo at Bristol, loaded a cargo of coal and carried it to Gothenberg, Sweden, and there took on another cargo, and sailed for Hull, England. On this last mentioned voyage she was sunk by a German submarine and totally lost. The Court held that although it was the intention of the *Ada* and her owners to pick up her cargo again at Bristol and carry that cargo to New York, the voyage from Bristol back to Sweden was a separate and distinct voyage, outside of the insured voyage, and that "The departure from the contemplated voyage, to be excused, must be one necessary to preserve the ship or cargo from imminent peril or danger", and that as such was not the fact, and as the *Ada* was sunk on a voyage outside the insured voyage, the war risk underwriters were not liable.

On the question of the warranty against restraint, etc., the Court then held that if the intermediate voyage from Swansea for Sweden and return to England could be considered forced on the master, as claimed by the plaintiff, the warranty against claims arising from capture, seizure, arrests, restraints or detainments by the British Government excluded from the insurance coverage any loss during such arrest, restraint or detainment, and said:

> "During this time of her seizure and detention by the British government, the vessel came within this clause of the policy and was at the risk of the insured for any damage or loss occasioned thereby. If she had been torpedoed during the time of capture or detention, there could have been no recovery on these policies. (Standard Oil Co. of New Jersey *v.* The

United States, 267 U. S. 76; Queen Insurance Co. of America *v.* Globe & Rutgers Fire Ins. Co., 263 U. S. 487; Andersen *v.* Marten, App. Cases, 1908, p. 334) * * * It may be said, however, that the insured claims that the second voyage was occasioned by the British government; that the voyage was not voluntary; that it was forced upon the master and thus became necessary, avoiding the consequences of the deviation. If this be so and the ship at the time it was sunk was proceeding not voluntarily, but under compulsion of the British government, by force of its orders and commands, or as a direct consequence of its restraints, then this clause does apply, and the insurance companies are not liable'' (241 N. Y. 211).

The Court below, and the petitioner also, so construed the restraint clause. The break-up of the voyage as originally defined, at Suva left petitioner uninsured because the break-up was proximately caused by Allied restraint (*The Llama*, 267 U. S. 76). Petitioner's broker, Mather & Company, appreciated petitioner's predicament. That was the reason (and the necessity) for Mather's cable requesting reinstatement of the coverage and amendment of the policy voyage. The first clause of the "Free of British Capture'' rider expressly excludes from the policy coverage all Allied restraints and all consequences thereof.

On the above authorities the Court of Appeals correctly held:

> The specification of the voyage originally insured, was amended by agreement so that the insured, (prescribed) voyage became a round voyage from San Francisco to Australia and back to Philadelphia.
>
> The prescribed voyage was broken up (frustrated), on January 5 to 9, 1942 at Brisbane, when continuation of the insured voyage became impracticable because of the operation of an excluded peril, Allied restraint.

When the "insured voyage" was terminated, the voyage insurance policies, also, were automatically terminated.

The petitioner has not cited any case to the contrary, nor have we been able to find any.

SECOND POINT.

Petitioner's arguments have no foundation in law or fact.

A. Answering Petitioner's First Point.

Petitioner presented its First Point under seven lettered headings. So far as possible, respondents will discuss the several clauses of the policies in the same order and with the same lettering.

(a) *The form of the policies and the Frustration Clause:* [Petitioner's Point I(a)]

Petitioner's American broker, Mather & Company, prepared and printed the entire policies (except the front and back covers) and sent them to England to be executed by the respondents (R. 262-4). Each policy consists of the American Institute Time (Hull) form of marine risk policy, on the left-hand margin of which is an exclusion known as the "Free from Capture and Seizure Clause" (F. C. & S.). A rider headed "War Risk Clauses" insures the risks excluded by the "F. C. & S." clause, and there is typed on the front cover a provision that the policies insure *only* against the risks of war, etc. On the *Portmar* policies the petitioner's broker then added a rider known as the "Free of British Capture" clause ("B. C. 2") which superseded *pro tanto* the previously-included provisions of the "War Risk Clauses". (A final rider covering damage from strikes and civil commotions is not involved in this case.)

Some of the policy clauses are referred to in the (a) paragraph of petitioner's first point (pp. 20 to 26), but chiefly the "Frustration Clause" of the war risk rider and the paramount "Free of British Capture" rider. Those two clauses were doubtless grouped together in an attempt to give some color to the belated argument *expressio unius, exclusio alterius* based on Judge Hand's mention of it in the Court of Appeals decision (R. 798). Petitioner did not include the Frustration Clause in its libel listing (R. 49-52); did not refer to it in the original appeal (R. 798); did not mention it in its petition for reargument (R. 806-818); and in its present brief (p. 20) concedes that it has no concern herein for underwriters.

The foregoing should have put to rest any question or argument concerning the "Frustration Clause". Petitioner now argues that the presence of that clause should negate *pro tanto* any consideration of frustration within the plain meaning of the later and paramount "B. C. 2" rider. Petitioner's statement (*brief, p.* 21) that both provisions are contained in the War Risk clauses is an oversight. The "B. C. 2" rider was entirely separate and specifically made paramount by the opening phrase: "Notwithstanding anything to the contrary contained in this policy, • • • ".

There is no force whatever to petitioner's belated claim.

The "Free of British Capture" rider will be analyzed (following petitioner's presentation) in lettered heading (d) at pages 43 to 45 hereof.

(b) *The Deviation ("Held Covered") clause of the policies.* [Petitioner's Point I (b)]

The "held covered" clause (usually called the "deviation clause") provides:

> "Held covered in the event of any breach of warranty as to date of sailing or deviation or change of

voyage, provided prompt notice be given these Insurers when such facts are known to the Assured and/or their managers and an additional premium paid if required" (R. 714).

The District Court held (R. 751), and both parties agree (*Pet. brief, p.* 27) that the "held covered" (or deviation) clause becomes operative only where there has been a voluntary deviation or change of voyage, and that it does *not* apply to the present case. That would seem to be a logical end to any discussion of the clause. Nevertheless petitioner undertakes to substitute argument where agreement is lacking.

Although this clause is necessary to avoid automatic termination of the policy in case of a *voluntary* deviation or change of voyage, and petitioner specifically disclaims any such deviation, or change of voyage (*brief, p.* 27), it argues that *a fortiori* if there is a diversion "under compulsion of sovereign control", the coverage "should be held to continue in effect" as a matter of law, even though there is no such provision in the insurance contract. There is no authority anywhere for such a contention, and to state it is its own refutation. Petitioner proposes that this Court inject into the policies an agreement by underwriters, which is not only not in the contract, but which no court or text writer has ever suggested was implied in the contract.

Quite apart from the above, what happened to the *Bortmar* was vastly different from a mere deviation from the insured voyage or a mere change of voyage. It was definitely termination of the prescribed voyage. As shown above such termination results quite independently of the assured's volition and knowledge. *Speyer* v. *New York Ins. Co.* (1808) 3 Johns. (N. Y.) 88; *Anderson* v. *Marten* [1908] A. C. 334.

The character of the events at Brisbane between January 5th and 9th, 1942 was such as to change completely the previous status of the *Portmar*. The vessel was at that moment converted into a unit of the United States military forces. It was thereafter for over a month employed by the Army in the northern waters of Australia, where a Japanese invasion was momentarily expected. The new service to which the *Portmar* was assigned culminated in her being sent as a warship carrying troops, guns, ammunition, and a landing launch on a dangerous military undertaking to occupy and defend the Port of Koepang which had already been bombed by the Japanese. The risk of battle was vividly described by the Commander of the U. S. S. *Houston* who briefed the Captain of the *Portmar* as follows:

> "Captain Rooks he told us four merchant captains that it would be a very dangerous mission and he said 'Gentlemen, Koepang Harbor is going to be a hot place. I don't even dare to take you into Koepang Harbor. I am going to take you up to the entrance and then, gentlemen, I am sorry to say I got to get out, you got to get in and do the best you can'" (Michelson, R. 405).

(c) *The agreed amendment of the originally-insured voyage.* [Petitioner's Point I (c)]

On January 24, 1942, the petitioner through its American broker, Mather Company, cabled its London broker, Thos. Stephens & Sons, Ltd.:

> "*PORTMAR* DIVERTED TO AUSTRALIA
>
> ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS STOP HOLD COVERED PENDING FURTHER ADVICES.
>
> MATHER CO." (Ex. 4, R. 586)

That was all that respondents were told. Respondents' reply to petitioner's London broker was set forth in Stephens' letter to Mather, reading:

"London, 6th February, 1942
W.
Posted 9/2/42.

Messrs. Mather & Co.
226, Walnut Street
Philadelphia, U. S. A.

RECEIVED
HULL
MAR. 9, 1942
DEPT.
MATHER & CO.

Dear Sirs,

Calmar S/S Corporation
Portmar /S/. Hull War Risk Insurance.

We have your cable of the 24th January last, advising that this vessel insured for the voyages from U. S. has been *diverted to Australia on the outward voyage under Government orders.*

We confirm that all Underwriters on our War Risk Policy have agreed to hold *this diversion* covered pending your further advices. (Italics ours.)

Yours truly,

THOS. STEPHENS & SONS, LTD.

H. Stephens, Director"

HS/OD.

(Ex. 5, R. 593)

It is submitted that the above correspondence can only mean that respondents were not willing to grant *carte blanche* to petitioner, but that they would cover "this diversion", *i. e.*, a diversion *"to Australia on the outward voyage"*, pending further advices. Respondents' agreement was only to cover a changed *round voyage*,—not, as petitioner claims, everything that might have happened up to February 6, 1942, the date of Stephens' letter.

The agreement was entirely in the past tense protecting the petitioner by reinstating its insurance to cover the *Portmar* to Australia on outward voyage. The District Court held that the correspondence constituted an amendment covering the *Portmar* on a round voyage to Australia and back to the United States (R. 744). The petitioner took no exception to the District Court's holding. The Court of Appeals adopted that same construction, referring to "A round voyage from San Francisco to Australia and Philadelphia" (R. 801).

After the Court of Appeals had published its decision, petitioner introduced a new note in its claim with respect to the amendment of the insured voyage. It asserted that an express agreement was made "as of February 6, 1942, extending the policy to cover the vessel *during* its diversion to Australia on the outward voyage under government orders (R. 807). Petitioner now calls it the "special 'held covered' agreement" of February 6, 1942 (*brief, pp.* 8, 14, 15, 28) giving a new name to its repeated, inaccurate characterization of respondents' agreement as one "to hold the vessel covered pending further advices." (*Petition, pp.* 5, 11; *brief on petition, pp.* 23, 24; *brief on argument, pp.* 2, 29, 30, 31).

Respondents did not know (what is now known) that Mather & Company's cable spoke of an accomplished fact that the vessel, as of January 24, 1942, had arrived in Australia, nor that the vessel's cargo had been discharged, sorted and reloaded, nor that the *Portmar* had been taken over for purely military service at Brisbane. Nor was it then known that the vessel had at that time been in Port Darwin and the waters north of Australia since January 19, 1942.

Petitioner argues that, because its London broker's letter was dated February 6, 1942, the policies must be held

to have continued in effect until that date. It continued with an even less valid argument that if the underwriters had refused to hold covered, it would have had a chance to obtain other insurance (R. 811; *brief, p.* 30). It appears on Stephens' letter that it was not received by Mather until March 9, 1942 (R. 593), two weeks *after* the *Portmar* had been shelled and beached at Port Darwin. Respondents did not know, even on January 24, 1942, from Mather's cable, that the *Portmar* was already in Australia and had already departed from the voyage as amended. The date of February 6, 1942, is entirely immaterial.

The cable (Ex. 4) and the letter (Ex. 5) speak for themselves. The respondents' agreement amended the policy "prescribed voyage" to a round voyage to Australia, and did not include new voyages with part new cargo in Northern Australian waters nor side trips out from Australia. It did not modify the policies or any of their terms, conditions or warranties in any other respect.

(d) *Meaning and effect of the "Free of British Capture" rider, marked "B. C. 2".* [Petitioner's Point I (d)]

Petitioner's brief has mentioned the "Free of British Capture" clause under several headings, but appears to have specially stressed it under the heading: "(d) *The declared intent of the parties should control*" (*brief, p.* 31). Respondents are thoroughly in agreement with the validity of that sound principle.

The "Free of British Capture" ("B. C. 2") rider is a single sentence; but, for convenience in discussion, its two clauses may be spaced by separating the first clause, as petitioner did (*brief, p.* 24), as follows:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising

from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in co-operation with or under the control of them or any of them;

"but unless the insured Vessel is condemned this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure or Detention."

As hereinbefore pointed out (p. 22) the first clause is an unqualified warranty against Allied restraints, and petitioner has not contradicted that proposition. The controversy is limited to the second clause of the rider.

1—*Analysis of the second part of the "B. C. 2" rider.*

Prior to 1940, the "Free of British Capture" clause was an *unqualified* warranty against British capture, etc. as in the warranty in *The Ada* (1925) *supra* pp. 24-26 reading:

"Warranted free from any claim arising from capture, seizure, arrests, restraints, preemptions or detainment of the British Government or their Allies."

The petitioner's own broker testified that the second half of the warranty rider came into use in 1940 by the American Marine Insurance Syndicate (R. 263-265). The 1940 modification of the earlier *unqualified* warranty against British capture, etc. is not discussed in any textbook, and has never

previously come before any Court for decision. So far as concerns this case, the pertinent part reads:

> "but * * * this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, * * *." (Emphasis ours.)

Both Webster's Dictionary (2d Ed. 1936) and The New Century Dictionary (1948) define "otherwise" when used as an adverb, as meaning "in other respects".

The words "losses *otherwise covered by this policy*" mean losses "in other respects" covered by the policy, i.e. losses sustained during the employment of the vessel as a cargo carrier and in some way related to the insured voyage, not losses after the vessel had been completely taken over by the Army and converted into a troop and gun transport and sent out of the insured voyage and into an active war area as part of a military expedition into a country not within the policy limits.

The second half of the rider excepts from the absolute exclusion of the first half of the rider, losses "otherwise covered by this policy", i.e., losses which would be covered by the policy if the vessel were doing what she did do, but not doing it under Government compulsion. It is clear that if there had been no military orders to the master at Darwin, and the petitioner had directed the master to load troops, guns and ammunition at Port Darwin and proceed to Koepang, or if the master had decided to do that on his own initiative, without any Governmental restraint, detention or requisition, such voyage would have been (1) an independent voyage, in no way related to the "insured voyage", (2) a different employment of the vessel, i.e., as a troop transport and not as a commercial vessel, and (3)

an intentional exposure to the risk of enemy attack and, for any one of the above three reasons, as held in the cases cited *infra*, at pp. 61 to 69 of this brief, such voyage would not have been covered by the respondents' policies. The District Court in fact said:

> "That changes in the voyage were made is not disputed; that if these were voluntarily made, the policies in suit would have been avoided, is not challenged" (R. 745).

Respondents agree with petitioner that the *Portmar* was never condemned (*brief, p.* 24). Therefore the phrase "unless the insured Vessel is condemned" may be eliminated from further consideration.

So far, then, as concerns this case, because the damage resulted from gunfire and bombs, the pertinent part of the second clause reads:

> "but * * * this warranty shall not exclude losses *otherwise covered by this policy* which are caused by gunfire * * * bombs * * *" (Emphasis ours).

Petitioner asserts that the losses were "otherwise covered" because gunfire and bombs are within the category of "hostilities or warlike operations" (*brief, p.* 24-5). That assertion is inadequate, because not all warlike operations are covered. The respondents' policies cover the *Portmar* on the specified voyage only, and Judge Hand noted with respect to petitioner's assertion:

> "* * * it overlooks the fundamental subject-matter of the insurance: *i.e.*, the *Portmar* on the prescribed voyage. All provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose" (R. 798).

It is rudimentary that, after any policy terminates, nothing happening thereafter can be "otherwise covered by this policy". *Export S.S. Corp. v. American S. O. M. P. & I. Association,* (1939, 2 Cir.) 106 F. 2d 9; Cert. den. 309 U. S. 686. It follows that when termination of the insured voyage at Brisbane automatically terminated the *Portmar* policies, nothing happening thereafter could be "otherwise covered by this policy".

Petitioner's and the District Court's error lies in their failure to give any effect whatever to the words "otherwise covered by this policy". The District Court, having adopted petitioner's contention, was driven to its logical and astounding conclusion:

> "The rider contains no time or geographic limitations on coverage irrespective of what Great Britain or her allies might do with the vessel. Nor is there imposed any restriction on the nature of the operations in which the vessel might be employed. Under the wording of the rider, the insurance would continue during the seizure, and requisition throughout an entire conflict and on innumerable and perilous voyages or missions over the waters of the world. Indeed, that is broad coverage! Yet, it is what the underwriters elected to cover and to read the rider otherwise is to interpolate limitations they did not choose to write" (R. 750).

According to the petitioner's argument, all that was needed to convert the *Portmar's* voyage policies into *permanent* insurance, regardless of voyage, or nature of employment, was Governmental restraint. On such a construction, there was no need of petitioner's brokers procuring an amendment from Underwriters holding covered the diversion to Australia.

This Court in *Reed* v. *Insurance Company* (1877) 95 U. S. 23 has given highest authority for the principle that a court will not construe language in an insurance policy to mean what would be so unreasonable as to amount to an "absurdity". In that case a marine hull policy covered the vessel from Honolulu via Baker's Island to the United States, and included the clause:

> "The risk to be suspended while vessel is at Baker's Island loading."

The vessel put into Baker's Island for loading, but was lost in a storm at Baker's Island before the loading commenced. The sole issue was whether the suspension of risk clause meant while the vessel was at the island for the purpose of loading or only while actually loading. The Court held that the latter meaning would be so unreasonable as to be absurd, and in affirming a decree for the respondent underwriter, Mr. Justice Bradley said at page 30:

> "A strictly literal construction would favor the latter meaning. But a rigid adherence to the letter often leads to erroneous results, and misinterprets the meaning of the parties. That such was not the sense in which the parties in this case used the words in question is manifest, we think, from all the circumstances of the case. Although a written agreement cannot be varied (by addition or subtraction) by

proof of the circumstances out of which it grew and which surrounded its adoption, yet such circumstances are constantly resorted to for the purpose of ascertaining the subject-matter and the stand-point of the parties in relation thereto. Without some knowledge derived from such evidence, it would be impossible to comprehend the meaning of an instrument, or the effect to be given to the words of which it is composed. This preliminary knowledge is as *indispensable* as that of the language in which the instrument is written. A reference to the actual condition of things at the time, as they appeared to the parties themselves, is often necessary to prevent the court, in construing their language, from falling into mistakes and even absurdities." (Italics ours.)

After quoting at length from Greenleaf and from Taylor, on Evidence, Mr. Justice Bradley continued at pages 31, 32:

"* * * we cannot doubt that the meaning of the words which are presented for our consideration is that the risk was to be suspended while the vessel was at Baker's Island for the purpose of loading, whether actually engaged in the process of loading or not. Taking this clause in absolute literality, the risk would only be suspended when loading was actually going on. It would revive at any time after the loading was commenced, if it had to be discontinued by stress of weather, or any other cause. It would even revive at night, when the men were not at work. This could not have been the intent of the parties. It could not have been what they meant by the words 'while vessel is at Baker's Island load-

> ing'. * * * And we think that no violence is done to the language used, to give it the sense which all the circumstances of the case indicate that it must have had in the minds of the parties."

The printed record in that case contains the testimony of four witnesses as to the meaning of the clause as understood in the marine insurance market, and the opinion of the Circuit Court had referred to that testimony. But the Supreme Court in its analysis and decision as to what was intended by the clause in dispute, did not refer to that testimony.

In the case of the *Portmar*, it is submitted, with all deference to the District Court, that an interpretation of the rider to mean that in the event of restraint, detainment or requisition, the insurance continued without "time or geographic limitations," or "any restriction on the nature of the operations in which the vessel might be employed" (R. 750) is not only contrary to the words of the rider, but is so unreasonable as to be untenable.

2. *Application of the "canon contra proferentem".*

Mr. Winter said that to him, as a marine underwriter of long experience, the rider was not ambiguous; and that the second part of the rider applied only "within the framework of that voyage" (R. 248, 251). If, however, in spite of the foregoing analysis, the rider appears ambiguous to this Court, it should, under settled law, be construed against petitioner, because its brokers proposed and actually prepared the policies including in them the American (not British) "Free of British Capture" rider, ("B. C. 2"). It should be noted that Mr. B. K. Ogden of the U. S. Maritime Commission had participated in the adoption of and formulation of the "B. C. 2" rider (R. 674).

> "If an ambiguity cannot otherwise be resolved, the ambiguous provision will be construed against the person responsible for its insertion. The assured may be so responsible, if the ambiguity arises in the slip, which by his agent he has put forward as the basis of the contract of insurance." Arnould on Marine Insurance (13th Ed.) Sec. 75, page 80.

> "The party within the proferentes doctrine is the assured who by his agent brings a slip to Lloyd's underwriters or the underwriters for the company and says: 'This is what I want; how much are you going to charge me?' and then the underwriter fixes the price of what he is going to pay upon the conditions on which he is asked to underwrite the risk." (*A/S Ocean* v. *Black Sea & Baltic General Ins. Co., Ltd.* (1935 C. A.) 51 Lloyd's List Law Rep. 305, at p. 307).

Likewise in *Marine Transit Corporation* v. *Northwestern Fire & Marine Insurance Company* (1933 D. C. E. D. N. Y.), 2 F. Supp. 489, the Court said at page 492:

> "The contract was prepared by brokers acting for the assured, and consequently is not to be most strongly construed against the company."

Despite the special application of the *canon contra proferentem* to an insurer on the clauses which the underwriter inserts in a policy, the principle is not given effect as to phraseology proposed by the assured. *Canton Ins. Office* v. *Independent Transp. Co.* (1914, 9 Cir.) 217 Fed. 213; *Birrell* v. *Dryer* (1884, House of Lords) 9 App. Cas. 345; 5 Asp. M. C. 267; *London Assurance Co.* v. *Thompson* (1902) 170 N. Y. 94.

3. *The Evidence as to the Formulation and Promulgation of the Second Half of the "B. C. 2" Rider, and its Meaning as Understood in the Insurance Market.*

It is always proper, where there is a dispute as to the meaning of a contract provision, for the Court to consider the circumstances of its making, and "all the surrounding circumstances at that time necessarily throw light upon the meaning of the contract". *Williston on Contracts* (1936 Ed.) Sec. 618. That is true whether there is ambiguity or not, and is not restricted to words of art. *Williston on Contracts* (1936 Ed.) Sec. 629; *Restatement of the Law, Contracts,* Sec. 230; *Connecticut Fire Ins. Co.* v. *Davison Chemical Corp.* (1944) 54 F. Supp. 2. Such evidence is appropriate and admissible particularly as to the history of the origin and purpose of the clause. *Metropolitan Exhibition Co.* v. *Ewing* (1890) 42 F. 198.

New insurance clauses have been held specially entitled to such inquiry. In *Calbreath* v. *Gracy* (1805) F. Cas. 2296; 1 Wash. C. C. 219, Washington, J., referring to a new insurance clause said at pages 219, 220:

> "This is a new clause, * * *. To understand it, we must pursue the rule adopted as to the exposition of statutes. We must find out what was the mischief it was intended to remedy, and then the extent of the remedy."

Under the foregoing principle, respondents on the trial introduced original records and testimony from American marine insurance sources showing formulation and promulgation of the 1940 "Free of British Capture" clause and its meaning in the insurance market. Mr. Livingston, Secretary of the American Marine Hull Insurance Syndicate, (comprising about 80 insurance companies R. 229), and Mr. Driver, Secretary of the American Institute of Marine Underwriters, (comprising about 135 marine insurance companies R. 234), produced and identified the original

records and deliberations concerning the several "Free of British Capture" clauses culminating in promulgation of the "B. C. 2" rider, which petitioner's broker appended to the *Portmar* policies (R. 230-1, 235-8).

In October 1939, the American Institute promulgated a "Free of British Capture" clause applicable to *cargo* (R. 241-2, 682), and in July 1940, a later edition (R. 242-3, 683-4), both of which warranted the cargo free of Allied restraints and continued: "but unless the insured property is condemned this warranty shall not exclude losses *otherwise covered by this policy* (or certificate) which occur while the property insured is *on board the overseas vessel* and which are caused by gunfire * * *" (R. 683-4).

In January 1940, the American Syndicate adopted a hull clause *"to cover while being detained for inspection by the British similarly to what has been done with the cargo clause"* (R. 671-2). It is obvious that the cargo phrase: "on board the overseas vessel" could not possibly be used in hull coverage, and was, therefore, omitted. The new clause was adopted January 18, 1940 as an amendment designed "to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being detained for inspection by the British" (R. 673-5). The minutes of the meeting of the Board of Managers of the American Marine Insurance Syndicate show that present at that meeting was "Mr. B. K. Ogden of the U. S. Maritime Commission" (R. 674), the same person to whom as Director, Division of Insurance, United States Maritime Commission, petitioner's president wrote on November 26, 1941, describing the *Portmar* coverage (R. 598-601). That letter concludes:

> "It is understood that should the voyage of the vessel be altered or changed by the charterer any

additional premiums required by underwriters shall be for the account of the charterer" (R. 601).

And Mr. Ogden approved the premiums on that coverage (R. 602). Yet Government counsel joined petitioner in arguing that "the military expedition" "to reinforce the defense of Koepang" was covered under that very "B. C. 2" clause which Mr. Ogden had known for more than 22 months was intended and declared to cover the vessel only "while being detained for inspection" by the British and their Allies.

Fortunately Mr. William D. Winter was available as a witness. He had participated in framing the "B. C. 2" clause, and testified that the minutes (R. 673) correctly stated the facts (R. 244). Mr. Winter is the outstanding American authority on marine insurance. He has been in that business for more than 49 years, actually underwriting both hull and cargo risks since 1909, an officer since 1917 and presently Chairman of the Board of the Atlantic Mutual Insurance Company. He was for many years one of the managers of the American Marine Insurance Syndicate, a director of the American Institute of Marine Underwriters and sometime president thereof, a director and sometime president of the New York Board of Marine Underwriters, and Chairman of the American Cargo War Risk Reinsurance Exchange from 1939 to 1950. He was also sometime lecturer on marine insurance at Columbia and New York Universities and at the College of the City of New York. He is author of the well-known work on "Marine Insurance", now in its third edition (R. 239-241). He was a disinterested witness (R. 239).

Mr. Winter stated the meaning of the "B. C. 2" clause in the marine insurance business. He testified that the first half of the rider was clearly understood in the insur-

ance world to *exclude absolutely* all Allied restraints (R. 248-250); and that the words, "losses otherwise covered by the policy", in the second part of the rider qualify the complete exclusion in the first part, by letting in *only* such losses as are "within the framework of that voyage" (R. 250-251). In effect, the foregoing makes the words: "otherwise covered by this policy" synonymous with "within the framework of that voyage".

Mr. Grotefend of Mather & Co., petitioner's American broker, testified that he had copied the rider from the Syndicate's form "which had been used on numerous occasions before", and was "currently being used in marine policies written by the Syndicate at the time" (R. 264-5); that he pasted the clause on each policy before sending it to London for respondents' signature (R. 262-4); and that the rider was in use from 1940 to 1945 (R. 265). He heard the testimony of Mr. Winter; but, notwithstanding his forty years insurance experience (R. 262), petitioner's counsel never asked him whether the meaning of the "B. C. 2" clause in the marine insurance business was in any way different from Mr. Winter's testimony or the records produced by Messrs. Livingston and Driver. The evidence of the meaning of the "B. C. 2" rider in the marine insurance business stands uncontradicted and unquestioned.

(e) *Plea of Compulsion* [Petitioner's Point I-(e)].

In its endeavor to perpetuate the error of the District Court that, under *Scott* v. *Thompson* (1805) 1 Bos. & P. 181, the insured voyage could not be terminated without petitioner's *voluntary* consent or approval, petitioner resorts to a discussion of deviation (*brief, Point I (e)*; *pp.* 38-40). In its conclusions of law 7 and 8, the District Court held:

> "The insured voyage was never voluntarily abandoned or terminated by libelant, the *Portmar* or her

master. * * * It was only because of the intervention of a sovereign that the return voyage was not commenced. * * * It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor" (R. 746-747).

The District Court's holding that the insurance coverage continued indefinitely cannot be sustained even as to deviations. The District Court quoted from *Scott* v. *Thompson* (1805), 1 Bos. & Pul. 181. In that case an action for sea water damage to goods insured on a neutral vessel from Liverpool to Amsterdam, the vessel, while en route, was boarded by H. M. Brig *Raven* and taken into Falmouth, where she was detained, apparently for examination. On being released, she proceeded immediately for Amsterdam, but en route encountered heavy weather and sprang a leak, causing the cargo damage sued for. The Court held that as the deviation was under compulsion, it did not terminate the insurance. But in that case the voyage was not broken up and terminated by the restraint, and furthermore the damage occurred during the continuance of the insured voyage from Liverpool to Amsterdam, not *during the enforced deviation.* Furthermore in *Scott* v. *Thompson* there was no warranty against restraint as there is in the *Portmar* policies.

The doctrine of *Scott* v. *Thompson* was definitely held *not* to apply to a case where the insured voyage is *terminated* by action of a sovereign government. *Parkin* v. *Tunno* (K. B. 1809) 11 East 22.

In *Anderson* v. *Marten* [1908] A. C. 334, the *marine* hull policy contained the clause "warranted free from capture, seizure and detention, and the consequences of hostilities." The plaintiff's vessel was captured by a Japanese cruiser during the Russo-Japanese War, and ordered into a Japan-

ese port. While so proceeding, she grounded and became a total loss, which was within the named risks. The House of Lords, affirming the Court of Appeal, held that the loss was a loss from capture and that marine underwriters were not liable for loss during the period of capture, even though (but for the capture) the grounding was a marine risk within the policy. Petitioner correctly described the holding of that case in its brief before the Court of Appeals as follows:

> "The stranding which occurred during capture was held uninsured because the policy was warranted free from capture. The loss was related to the capture during which it occurred."

Anderson v. *Marten* was decided by the House of Lords in 1908, two years *after* the British Marine Insurance Act, 1906, had been enacted.

The citations in petitioner's brief (pp. 38-9) are entirely beside the point, because in none of them was the ship taken over for military use, in none was the loss suffered during or because of the diversion, and in none did the policy contain an express warranty against the cause which produced the deviation, excepting only *Aktiebolaget, etc.*, v. *American M. M. Ins. Co.* (*The Ada*) 241 N. Y. 197. *The Ada* policies did contain a warranty against restraint, almost identical with the first part of the "Free of British Capture" rider on the *Portmar* policies, and the Court of Appeals' decision in that case is irreconcilably contrary to the petitioner's contention. *The Ada* is discussed at length (*supra*, pp. 24-26), and is relied on by respondents. It may be repeated here that the New York Court of Appeals, in discussing the clause excluding Allied restraints, said:

> "If . . . the ship at the time it was sunk was proceeding not voluntarily, but under compulsion of

> the British government, by force of its orders and commands, or as a direct consequence of its restraints, then this clause [Free of British Capture clause] does apply, and the insurance companies are not liable" 241 N. Y. 211.

How far afield petitioner's several citations are, will appear from a glance at the reports:

Robinson v. *Marine Ins. Co.* (1806) 2 Johns. (N. Y.) 89:

The schooner *Sukey and Polly* insured from New Orleans to several West Indies ports skipped the first listed port of Cape Nichola Mole to avoid a blockade and headed toward the second named port. On this second leg of insured voyage, she was damaged by bad weather. Chancellor Kent excused the deviation of not calling at the embargoed port.

Post v. *Phoenix Ins. Co.* (1813) 10 Johns. (N. Y.) 79:

The *Radius* put in at St. Antona to avoid British capture, and was there captured by the French. Said Chancellor Kent: "Being a peril insured against, it follows, of course, that the assured is justifiable in a deviation to avoid it; * * *"

Graham v. *Commercial Ins. Co.* (1814) 11 Johns. (N. Y.) 352:

Cargo was insured on the brig *African* from Sweden to St. Petersburg. The brig was held up by bad weather and adverse winds and "stood in for Revel Bay" for shelter from insured risks when she ran aground. The Court said that "if the captain * * * has no other view but to conduct the ship and cargo to the port of destination, the policy still continues."

Burgess v. *Equitable Mar. Ins. Co.* (1878) 126 Mass. 70, 79:

The fishing schooner *Christie Johnstone* ran out of bait, and went to the nearest practical port for more bait. After return to the fishing grounds, she was lost by an insured peril. Said the Court at page 83: "As in the opinion in the Court the trip to St. Peters was a deviation which *discharged* the *insurer,* by the terms of the report there must be judgment for the defendant."

Audenreid v. *Mercantile M. Ins. Co.* (1875) 60 N. Y. 482:

The steamboat *Meteor* was insured against sea perils including fire, from Philadelphia to New York, with liberties to touch and stay. The voyage was interrupted for repair. The repairs were not made necessary by any insured peril or by anything that occurred on the voyage. While lying at Chester under repair, she was destroyed by fire, an insured peril. The "policy was terminated by the interruption of the voyage and the delay at Chester without the assent of the underwriters" (pp. 486-7).

Marfland Ins. Co. v. *LeRoy* (1812) 7 Cranch 26:

Insurance on the ship *John,* from New York to trading on the African coast and return to New York, with liberty to touch at Cape Verde Islands on return for "stock". At Fogo, the vessel took additional cargo not sanctioned by the policy. The trial court left it to the jury to decide whether the breach enhanced the risk. That, this Court held to be error, saying:

> "The discharge of the underwriters from their liability in such cases, depends, not upon any supposed

increase of risk, but wholly on the departure of the insured from the contract of insurance" (p. 30).

Not one of the cited cases sustains petitioner's contention that all diversions are automatically excused, if involuntary. The most that can be predicated on any of the citations is: that compulsory diversions may be overlooked provided the causes are not excluded perils; that they are made to avoid an insured risk; that the diversion is not itself the cause of the loss; and that the diversion does not terminate the "insured" voyage.

(f) *The decision of the House of Lords in Rickards* v. *Forestal Land, etc. Co.* [*1942*] *A. C. 50* [Petitioner's Point I (f)].

The petitioner erroneously asserts that the decision of the Court of Appeals herein is in direct conflict with the *Rickards* case. The decision of the Court of Appeals herein is in complete accord with the decision in the *Rickards* case. They eventuated differently because the coverage and the insured subject differed.

The *Rickards* case involved war risk insurance on British *cargoes* carried on German vessels. On the outbreak of war, under orders of the German Government, the shipmasters abandoned their voyages and attempted to reach Germany. One vessel reached Germany. The other two were scuttled. The policies in the *Rickards* case, however, differed essentially from the *Portmar* coverage; the former insured cargo, not hull, and contained no general "restraint" clause but only an exclusion of voyage frustration. The entire controversy in the *Rickards* case centered only on the frustration clause, which, as the petitioner admits (*brief, p.* 20), is inapplicable in the *Portmar* case.

1. *Cargo coverage differs radically from hull coverage.*

The House of Lords in giving recovery to the assured cargo owners were at great pains to point out an essential distinction between cargo and hull insurance, illustrating why the facts in the *Rickards* case require a recovery as to cargo and a dismissal as to hull.

By Viscount Maughan [1942] A. C. 69, 70-71:

> "* * * in the case of a policy on goods in normal form the owner can claim either for loss of goods or for loss of adventure, while in the case of a policy on the ship the underwriters are liable only on loss of ship and are not liable in respect of loss of adventure."
>
> "* * * It is clear that the position of underwriters in regard to a policy on a ship is entirely different from that of the owner of merchandise. * * * It is now well-settled, contrary to the opinion of LORD MANSFIELD in *Miles* v. *Fletcher* [1779] 1 Doug. (K. B.) 231, that the loss of the voyage has nothing to do with the loss of the ship."

By Lord Wright [1942] A. C. 90:

> "The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods. This is very old law. LORD MANSFIELD insisted on applying the same rule to an insurance on a ship, but this view was rejected, and it was said that the loss of the voyage has nothing to do with the loss of the ship. The ship is a vehicle employed in general trading, not wedded to any particular adventure."

The *Rickards* decision is thoroughly in accord with the American law on the subject. In *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, this Court pointed out that, contrary to insurance on *cargo* for a voyage, insurance on a

vessel for a voyage does not insure completion of the insured voyage. Story, J., said at page 401:

> "This was expressly held by this Court, in the case of *Alexander* v. *The Baltimore Insurance Company*, 4 Cranch R. 370, where it was decided that an insurance on a ship for a voyage, was not to be treated as an insurance on the ship *and* the voyage, or as an undertaking *that she shall actually perform the voyage;* and, only, that notwithstanding any of the perils insured against, she shall be of ability to perform the voyage; and that the underwriters will pay any damage sustained by her, from those perils, *during* the voyage" (Italics ours).

Arnould "Marine Insurance" [13th Ed.], at the end of Sec. 1104, states that the foregoing statement of law as to *hull* insurance is the established law of both England and the United States. Petitioner has now conceded that principle (*brief, p.* 20).

Accordingly, because of the policy exclusion of frustration of voyage, the cargo assureds in the *Rickards* case could not recover on the ground of termination of the voyage short of its destination. But those same cargo assureds did recover on the other incident of cargo coverage, to wit: the loss of the cargo itself caused by an insured peril, namely: Enemy "restraint". Lord Porter pointed out that, when the insured voyage came to an end, cargo underwriters were still liable for all the damage that followed in the wake of German seizure. That is definitely the law of the United States. *The Llama,* 267 U. S. 76; *Muller* v. *Globe & R. F. Ins. Co.,* 246 F. 759. As to hull coverage, when the voyage ends, the coverage ends. There was no liability of hull underwriters which could survive termination of the voyage, because the *Portmar* damage was occasioned by enemy attack which occurred after the voyage was broken up.

2. *The* Rickards *policies contained no general "restraint" clause.*

Each of the *Portmar* policies contained an absolute exemption from restraints by the Allied Governments, in the first part of the "Free of British Capture" rider (R. 714-5), whereas the *Rickards* policies contained no such exclusion of restraints by the German Government. The sole basis for recovery in the *Rickards* case was the loss of cargo caused by seizure, capture, restraint, etc. of the German Government [1942] A. C. 111. Petitioner has not denied or questioned the validity of that general exclusion, and Judge Hand's opinion confirmed its effect as an absolute exclusion (R. 797-8). If there had not been an absolute exclusion, and respondents had been liable for Allied restraints, there would have been no need to amend the limits of the voyage originally insured to substitute Australia for the Philippines. Under those circumstances, as declared in *The Llama* (267 U. S. 76) respondents would have been liable for consequences of restraints, etc. after the *Portmar* sailed from Suva for Australia.

The opinions in the *Rickards* cases both in the King's Bench Court of Appeal, [1941] 1 K. B. 225, and in the House of Lords [1942] A. C. 50, indicate how futile the *cargo* insurance would have been if German restraints had been entirely excluded from the coverage. Petitioner has stressed that point and quoted language of the British courts to add further emphasis (brief, footnote p. 42); and respondents do not dispute a syllable of those opinions as applied to the facts in the *Rickards* cases. What petitioner has failed to mention is that the *Rickards* insurance related to cargo completely in German custody and utterly beyond any control by the assureds and covered against German restraints. If German restraints had been excluded entirely,

there would have been no basis for liability in the *Rickards* decision.

In our case, as both the District Court (R. 744) and the Court of Appeals (R. 793-4) noted, the Allied restraint, which was imposed when the *Portmar* arrived at Suva, did not terminate the coverage at that point because the prescribed voyage was amended to substitute "Australia" for the "Philippines". It was only when through Allied restraints the return voyage became impracticable at and after arrival at Brisbane, that the prescribed voyage and the policies were terminated.

At the top of page 43 of its brief, petitioner has attempted to brush off the vital distinctions between the *Rickards* case and the *Portmar*, by asserting that safety of the subject-matter was prime in both cargo and hull insurance. It is only losses within the accepted risks that underwriters are concerned with. The liability for German restraints (except frustration) was the basis for recovery in the *Rickards* case, whereas the *exclusion* of Allied restraints in the *Portmar* policies preclude respondents' liability.

The *Rickards* policies covered the loss by eventual scuttling of two German vessels and the loss by seizure of the cargo of the third on arrival in Germany, [1942] A. C. 111, because German restraints, excepting only frustration, were among the insured risks. Those restraints had become operative before the voyages had been broken up, and all loss that followed upon the restraint was within that coverage. *The Llama* (1925) 267 U. S. 76; *Muller* v. *Globe & R. F. Ins. Co.* (1917, 2 Cir.) 246 Fed. 759; *Anderson* v. *Marten* [1908] A. C. 334.

It is obvious that the decision in *Rickards* v. *Forestal* [1942] A. C. 50, has nothing in common with the present controversy.

3. *The* Rickards *decision sustains respondents' position.*

So far as the *Rickards* decision touches upon the circumstances of the present controversy, it definitely supports respondents' position and is in complete harmony with Judge Learned Hand's opinion in the Court of Appeals.

By Lord Porter:

> "It is true that a loss which occurs after the insured voyage (whatever it may be) is terminated, is irrecoverable, * * *" [1942] A. C. 106.
>
> "At sometime, each of the masters abandoned the insured voyage and set his vessel's course for Germany or the bottom of the sea according to circumstances. At that moment the insured voyage came to an end, * * * [1942] A. C. 110.

but underwriters in the *Rickards* cases continued liable for the eventual loss of the cargo even though it resulted from the same enemy restraints which frustrated the voyage, *because only frustration was excluded.* That resulted from the terms of the insurance, whereby the *Rickards* policies did *not* exclude *all* consequences of German restraints (but only frustration of the voyage) whereas the *Portmar* policies did exclude *all* Allied restraints.

The decision of the Court of Appeals in the *Portmar* is completely in harmony with all the decisions on the subject both of this Court and of the House of Lords.

g—*Increased Risks.* [Petitioner's Point I-(g).]

Petitioner in section (g) of its First Point (p. 44) has feigned that the Court of Appeals referred to the diversion to Australia when it mentioned the increased risks following the restraint at and after Brisbane, and that the "prescribed

voyage" still remained the originally-insured voyage to the Philippines. The Court below made its meaning perfectly clear that it was referring to the round voyage, as amended by the agreement to hold this diversion to Australia covered, namely: "from San Francisco to Australia and Philadelphia" (R. 801). The originally-insured voyage was broken up when the *Portmar* was sent to Suva, and (as petitioner said of the insurance, R. 811) "by express agreement it was continued, or reinstated." Again: "Thus the war risk insurance involved here consisted of the original policies and the special 'Held Covered' agreement of February 6, 1942" (*brief, p.* 8).

The tremendous increase of risk, when the vessel was sent from Brisbane to waters north of Australia, was too obvious to admit of argument. What might or might not have been involved if the voyage to the Philippines had not been amended is entirely beside the point, and completely irrelevant and immaterial to the merits of the present controversy.

B. Answering Petitioner's Second Point—Frustration of the *Portmar's* insured voyage.

In its petition and brief on application for a writ of certiorari, and in the entire Second Point of its present brief (pp. 45-52), as well as its summary (pp. 16-17), petitioner has sought to engraft upon the insurance policies the provisions of its charter party with the Government. The petitioner concedes that the policies do not refer to the charter, nor were respondents a party to it (*brief, pp.* 17, 21; R. 18-38). The burden of petitioner's second point is:

> "The voyage of the *Portmar* was not frustrated because the provisions of the *charter* * * * explicitly

> anticipated and provided for the effect of any deviation or restraint * * *" (*brief*, pp. 16-17).
>
> "The parties to the charter, viz., petitioner and the United States Maritime Commission, treated the voyage and the charter as continuing in effect until information was received as to the extent of the disaster" (*brief*, p. 17).

and its case against the declared break-up of the voyage is predicated not at all on the *insured* voyage but exclusively on the *charter* voyage.

The charter party is *res inter alios acta* and its terms and provisions cannot in any way affect the entirely distinct and unrelated insurance contracts. *Fresh* v. *Gilson* (1842) 16 Pet. 327, 332; *American D. Corp.* v. *Dirigold M. Corp.* (1942, 6 Cir), 125 F. 2d 446, 452. No departure from the agreement contained in the policies can be affected by petitioner's relations with third persons without respondents' consent. In a case involving a charter party, this Court said:

> "* * * the contract related to a particular ship just as it related to a particular voyage. Neither could be changed without departing from the contract, which could not be done without the consent of both parties." *Texas Company* v. *Hogarth S. Co.* (1921), 256 U. S. 619, 627.

All cases involving frustration concern specific contracts or undertakings, which have been thwarted. If the Government charter had authorized or required that the *Portmar* proceed to Murmansk under its charter party, could that operate to extend the insurance contract to cover such a diversion? To ask the question is to answer it. Judge Hand referred to

> "* * * the fundamental subject-matter of the insurance: *i.e.*, the *Portmar* on the prescribed voyage. All

> provisions of the policy must be read with that limitation in mind; for they were all ancillary and implementary to that purpose" (R. 798).

Whether the *chartered* voyage was frustrated or not is utterly immaterial, only the *insured* voyage is material so far as respondents and their policies are concerned. Petitioner has seized upon an obvious typographical oversight in Judge Hand's opinion, just as did the Solicitor General's brief as *amicus curiae* supporting the petition for the writ (*footnote*, p. 3), namely: "A policy, upon a voyage *charter* must be understood to be coextensive with the insured voyage, * * *" (R. 801; 197 F. 2d 801). The word "charter" should obviously be deleted; for there was no policy on the voyage charter, the charter was not at all involved in the present insurance controversy, the petitioner well understood the true import of the passage in its petition for rehearing, *viz:*

> "It may be granted that the policy on the *Portmar* 'must be understood to be coextensive with the voyage,' * * *" (R. 814)

and the reasoning in the opinion shows beyond cavil that the principle Judge Hand invoked was that *hull voyage policies are co-extensive with the insured voyage.*

There can be little doubt that petitioner could find no basis upon which to even cast doubt upon the Court of Appeals holding that the *insured* voyage was broken up at Brisbane between January 5 and 9, 1942. That left for argument only the thoroughly untenable contention that—somehow or other—arrangements with the Government as charterer should completely govern respondents' liability under the insurance policies.

The entire argument, specifically, Petitioner's Second Point, is utterly without merit.

THIRD POINT.

Even if the break-up of the *Portmar's* voyage had not terminated the policies at Brisbane, as held by the Court of Appeals, (1) employment of the *Portmar* as a military vessel, (2) her independent voyage for Timor, and (3) her deliberate exposure in the waters north of Australia to expected enemy attack, preclude any recovery by Petitioner against Respondents.

Petitioner has throughout the present litigation attempted to excuse breaches of the policy terms and conditions by claiming (what is factually correct but immaterial) that the Government compelled performance of the acts which constituted those breaches of the insurance contract. As shown at pages 22 to 27 of this brief, the first half of the "Free of British Capture" rider constituted an express warranty excluding such restraints. In *Dole* v. *New England M. M. Ins. Co.* (1864) F. Cas. 3, 966; 2 Cliff. 394, 415, the Court states with regard to such warranties:

> "The legal construction of the clause is that the underwriter is liable for the direct effects of the perils insured against, while the assured stipulates to bear the direct effect of those perils which are excepted."

The petitioner's plea of compulsion has been fully discussed at pages 45 to 50 of this brief. The circumstance is mentioned at this point because petitioner (*brief, pp.* 67-71) has already made its claim clear that Governmental "restraints" rendered all the *Portmar's* movements involuntary, and for that reason only, respondents are asserted to be liable for the consequences of those excepted risks.

There is no question that the three policies issued by the several respondents on the *Portmar* against war risks covered a commercial round-trip voyage on a merchant vessel. The *Portmar* was a registered vessel, she was listed in Lloyd's register as a merchant vessel, she was described in the libel as "a single screw ocean cargo steamship", she had never been used as anything other than a cargo vessel since the petifioner acquired her, in 1930, and she was entirely unarmed (R. 46, 129, 160, 580). Constant references in the policies themselves, such as "cargo", "trade", "general average"—are all applicable only to a merchantman on a commercial voyage. When Messrs. Mather's cable and Stephens' reply changed the originally-insured voyage to a round-trip voyage to Australia and return to United States the voyage thus prescribed, of course, continued as a commercial voyage under the insurance (R. 586, 593). There is nothing in the record which would justify any claim that the voyage which respondents insured was ever anything but a commercial voyage.

To be sure, relations with Japan were strained on November 27, 1941 when the insurance was effected. Petitioner (*brief, p.* 36) as well as the District Court (R. 751) both took notice of those conditions and both equally failed to note that under those circumstances petitioner deliberately asked for insurance coverage which exempted Underwriters from Government requisitions, restraints, etc. Petitioner has not asserted that the insurance was anything but insurance on a vessel for a commercial voyage. Its claim has been directed to the assertion that without regard to that circumstance the facts which broke up the commercial voyage and changed the status of the vessel without respondents' consent were compulsory and involuntary on petitioner's part.

Even if it should be held that the *Portmar's* "insured round voyage" was not terminated at Brisbane when the Army took complete control and sent her north more than 2,000 miles in the direction of impending invasion, it was certainly terminated at the latest when, after discharge at Wyndham on February 8, 1942, of all her cargo including what had been added in Australia, she returned "light" to Port Darwin, and loaded troops, field guns and ammunition for Koepang.

A. Employment of the *Portmar* as a military vessel.

The radical change in the character of the use of the *Portmar* from merchantman to a military unit and her continued employment as a military unit in an active war area, "added so notably to the risks of the prescribed voyage that the voyage ceased to be the same" (R. 801).

In *Canton Ins. Office, Ltd.* v. *Independent Transp. Co.* (1914, 9 Cir.) 217 Fed. 213, the steamer *Vashon* was insured in July 1907 for a term of one year, as a general passenger and freighting vessel on Puget Sound. About a month later (August) she was retired from that service. Four months later (December) the *Vashon* was anchored in a river. Subsequently but before expiration of the one-year term, without any known cause she filled with water and sank at her moorings. In the suit brought to recover against Underwriters, the Court in denying a recovery, said:

> "We do not say that a vessel insured as being employed in navigation may not suspend navigation for a time, or lay up at a dock, but that is a different thing from going out of commission for a period of months."

The authority of the above decision is not affected by the fact that the insurance was under a time policy warranty. The Court quoted with approval Lord Watson's opinion in the House of Lords in *Birrell* v. *Dryer* [1884] 9 App. Cas. 345; 5 Asp. M. C. 267:

> "To define the limits within which the vessel is to be navigated for the purpose of a time policy is, in principle, precisely the same thing as to describe the voyage for which a vessel is insured under an ordinary policy."

See:

Arnould on Marine Insurance (13th Ed.), Sec. 436.

In *Andrews* v. *Essex F. & M. Ins. Co.* (1822) F. Cas. 374; 3 Mason 6, Judge Story discussed insurance on a voyage which turned out to be illicit trading,—entirely without intention on the part of the insured,—and said at page 17:

> "It is perfectly settled that the underwriters, by the general terms of the policy, are not liable for any loss arising from foreign illicit trade, unless the policy be underwritten with the full knowledge on their part that such was the object of the voyage."

and at page 23:

> "The chance of illicit trade is never assumed, unless it is clearly intended to be carried on."

In *Hermann, Briggs & Co.* v. *Western M. & F. Ins. Co.* (1839), 13 La. 516, the Louisiana Supreme Court denied recovery from marine underwriters where a cargo-passenger vessel was lost, because at the time of loss she was being used temporarily as a tow boat, which use increased the risk to the insured vessel.

The employment of the *Portmar* as a warship was farthest from the minds of petitioner and respondents. It increased, beyond measure, the risk of loss or damage from enemy attack. Under the above authorities it was clearly not within the coverage of the policies.

B. The *Portmar's* independent voyage to Timor.

The employment of the *Portmar* as a troop ship from Port Darwin bound for Koepang was on an independent voyage in no way related to the "insured voyage," was not undertaken for the safety of the *Portmar*, did not in any wise promote the purposes of the "insured voyage" and was clearly not within the meaning and intent of the parties to the insurance contract. That diversion, therefore, could not under any circumstances be regarded as covered by the policies.

In *Snyder* v. *Atlantic Mut. Ins. Co.* (1884), 95 N. Y. 196, the Court said at page 205:

> "Whatever contention may arise over other questions in the case, it cannot, we think, be questioned that a vessel which leaves the port of her departure in pursuit of the insured voyage, without intention of returning, has commenced her voyage in such a sense as to be protected by a policy of insurance, covering her from perils during such voyage, and that *an independent voyage undertaken by her, after such a departure, causes a forfeiture of her insurance.*" (Italics ours.)

In *Seccomb* v. *Provincial Ins. Co.* (1865), 92 Mass. 305, a vessel was insured on a round voyage from New York to Buenos Aires and Monteyideo and return, with liberty to go to port or ports in Europe. After reaching Rio de Janeiro, she proceeded to Malta and Constantinople, and there

entered into a French charter for a round trip to the Crimea and return to Constantinople. After completing that side trip, she sailed to Smyrna and then to Boston, and was lost en route. The Court gave judgment for the underwriter on the express ground that the independent voyage starting at Constantinople terminated the insurance. The Court said at pages 310, 311:

> "Certainly it is inconsistent with any fair and reasonable interpretation of the clauses in question to hold that they embrace, *ex vi termini*, a right to make distinct, separate and independent voyages, having no connection with the general objects and purposes of the voyage, either outward or homeward, named in the policies, but undertaken as new and intermediate voyages, having no reference to the accomplishment of the ultimate destination of the vessel or her port of discharge. Such an interpretation would convert a voyage policy, limited in the extent and duration of the risk insured to a particular adventure or enterprise, *into a contract of insurance for an unlimited period of time, and upon risks the nature and extent of which neither of the parties to the contract could know or foresee.*" (Italics ours.)

Arnould on Marine Insurance (XIII Ed., 1950) discussing policy clauses giving liberty to touch and stay at ports, says in Section 406 at page 400:

> "Intermediate Voyages.
> 406. In like manner, although the words of the clause are of the most extensive nature, the ship will not be protected by such a policy if, at the time of loss, she be on an intermediate voyage, not subordinate to or connected with the voyage or voyages contemplated by the parties as the principal objects of the contract (unless sanctioned by a well-established usage)."

When the *Portmar* sailed February 15, 1942, for Koepang, she entered on an "independent voyage" in no way connected with the insured round trip voyage. Even if it be held that the respondents' insurance had not already terminated, nevertheless under the authorities above quoted, whatever insurance covered the vessel when she began loading troops, guns, etc. for Koepang, was at that moment at the very latest, terminated. The policies terminated without regard to causal connection.

C. Deliberate exposure of the *Portmar* to the risks in Northern Australian waters where enemy attack was momentarily expected.

Insurance against risks *specified* in a marine insurance policy does not cover loss from those specified risks if the vessel is intentionally or recklessly exposed to those risks.

From Sydney, where the *Portmar* arrived December 30, 1941, she was sent north to Brisbane, 529 nautical miles, then north to Port Darwin, a further 2,097 nautical miles, then west to Wyndham, 286 nautical miles, through waters controlled by the Japanese into the face of almost certain attack. Proof of the imminence of Japanese attack is set forth at pages 8 to 13 of this brief.

From Brisbane on, the *Portmar* steamed right back into the very waters, the dangers of which had necessitated her original diversion to *southern* Australia for safety.

The law that risks to which a vessel is *intentionally* exposed are not covered, even though specified in the policy, has been laid down in cases where the loss was caused by intentional exposure to "capture," to "collision" with ice, and to "perils of the sea."

In *Cleveland* v. *The Union Insurance Company* (1811) 8 Mass. 308, the defendant's marine time policy gave the plaintiff's vessel world-wide trading liberty and covered

her against all the usual perils, including "capture and detention of princes" (308, 309). At Isle of France the vessel obtained a cargo for Bombay, but the ship's register showing her ownership and neutrality, her cargo manifest and her Mediterranean passport were left behind at Isle of France. On that voyage she was captured by a British frigate, taken into Colombo, Ceylon, and there condemned by a Prize Court because of her lack of papers proving her neutrality. The Supreme Court of Massachusetts reversed a verdict for the plaintiff assured, on the ground that the risk of "capture" had been unnecessarily incurred through lack of ship's papers.

The same law as to intentional exposure to risk was laid down by Mr. Justice Story in *Haven* v. *Holland* (1820) (C. C. 1st C.) 2 Mason 230; Fed. Cas. 6,229, a suit by cargo owners against their underwriter for loss of the cargo by capture. The carrying vessel, the *Volant,* was a commercial vessel, but held a commission and letter of marque, which fact was known to the underwriter. The *Volant* was captured and condemned as prize together with her cargo. The question was whether she was captured as the result of her having herself gone out of her way to make a capture. That question was left to the jury; but Story, J., in his charge to the jury said at page 232:

> "It is clear from the authorities, that a vessel insured as a letter of marque has no right to cruise at large for prizes."

In *Newton Creek Towing Company* v. *Aetna Insurance Company* (1900), 163 N. Y. 114, the owner of a tug sued its liability underwriters on a policy of marine insurance which indemnified the plaintiff against its liability to others for loss or damage to any other vessel caused by collision for which the tug or the plaintiff might be legally liable.

The Court found that the plaintiff's tug had intentionally *forced its tow* through an ice floe, and held that the resultant *damage to the tow* was, therefore, not covered by "collision" within the meaning and intent of the policy.

In affirming judgment for the defendant, Parker, C. J., said at page 116:

> "* * * when the master of the vessel insured designedly takes the chance of running into a perfectly apparent obstruction, *although with the hope and expectation that the vessel will successfully meet the encounter*, the contact is not a collision within the meaning of the term as employed in this contract." (Italics ours.)

Newtown Creek Towing Co. v. *Aetna Insurance Co.* was cited by the Federal District Court in *Mellon* v. *Federal Insurance Co.* (1926 D. C. S. D. N. Y.), 14 F. 2d. 997, and although held inapplicable to the facts of a vessel's boiler explosion, the Court did not question the correctness of the holding in the *Newtown Creek Towing Company* case. Judge Augustus N. Hand summarized the holding of the *Newtown* case at page 1002:

> "The vessel was *purposely* taken through an ice field in the hope that she would not suffer injury, *and did not merely come in contact unexpectedly* with floating cakes of ice. Such an impact was held not to be within the nautical definition of a collision." (Italics ours.)

In *Standard Marine Insurance Co., Limited* v. *Nome Beach Lighterage & Transportation Co.* (1904 C. C. A. 9 C), 133 Fed. 636, an action by insured cargo owner against its underwriters for damage to cargo from perils of the sea, the plaintiff was also owner of the carrying vessel, and the master forced the vessel through ice in Alaskan waters in order to arrive at destination, Nome, by an early date.

The Court held that damage caused by pushing a vessel through ice is not a loss by perils of the sea within a policy insuring against "perils of the sea" (p. 647). A provision of the California Civil Code, which was made a part of the policy, provided "an insurer is not liable for a loss caused by the willful act of the insured," but the Court held that that provision was *declaratory of the general principle of law* (p. 651). *Certiorari* was denied in 200 U. S. 616.

To the same effect is *Williams* v. *New England Mutual Marine Insurance Company* (1869 C. C. D. Mass.), 3 Clif. 244, a decision by Supreme Court Justice Clifford, sitting on circuit. That was an action by the owner of the steamship *New York* against her marine hull underwriters to recover for a total loss of the vessel, while under charter to the War Department of the Government as a Government transport, and like the *Portmar* in charge of her owner's master. She was loaded by the Government as charterer with ordnance stores, and her master was ordered by the Army to proceed to Hatteras Inlet, there to take a pilot and proceed across the bar, for delivery of her cargo to the Union troops. In carrying out the *Government's* order, she struck on the bar and became a total loss (p. 247). Mr. Justice Clifford held at pages 248-250, that "the attempt to cross the bar was an unjustifiable, rash and hazardous act of navigation which no prudent or skillful navigator would have undertaken"; and that, therefore, the hull underwriters were not liable to the plaintiff, although the master would not have made the attempt except for the *compulsory order* of the Government.

The intentional exposure of the vessel to a risk named in the policies in the above cases pales out when compared with the intentional exposure of the *Portmar* to the risk of enemy bombing all the way from Brisbane on. In *Haven*

v. *Holland* and in *Williams* v. *New England Mutual Insurance Co.*, the plaintiff (the insured) had no part in the intentional exposure of his property, and in the latter case the compulsion was a Government order. It is immaterial whether the intentional exposure of the *Portmar* was by the petitioner or by the sovereign Government of the United States.

FOURTH POINT.

The *Portmar* was never a constructive total loss, and petitioner's attempted abandonment on April 8, 1942 was invalid.

The Court of Appeals specifically omitted analyzing the alleged Constructive Total Loss because it considered its decision on termination of the policies conclusive of all issues (R. 793). Petitioner has utterly failed to sustain the proposition that the *Portmar* was ever a constructive total loss or effectively abandoned, for: (1) its exaggerated expense claims are fantastic, (2) its claims involve attempted expungement of express policy covenant, and (3) its claims tend to defeat respondents' subrogation even as to "just compensation" from the Government for the requisition of title to the *Portmar*.

A. Petitioner's claim of constructive total loss is based on gross exaggerations.

Petitioner, faced with the necessity of finding an expense total exceeding $860,000 the insured value, argues for such a "*number*" not based on fact, which carries far beyond even the realm of speculation, into the fantastic. The following appears from the record and from petitioner's brief (p. 59):

	Petitioner's Claim	Proven Expense
Salvage	$487,500.00	$ 20,008.59
Towage to Brisbane	55,130.00	55,130.00
Expense of Full Repair	390,000.00	91,000.00
Totals	$932,630.00	$166,138.59

Such incredible disparities, especially on salvage, demand analysis, the more so because nineteen months after the Master's return to New York, petitioner in its libel stated the all inclusive total expense as $250,000 (R. 68-9).

a. Salvage.

(1) *Notice of abandonment having been given April 8, 1942, salvage cannot be included in the expense of recovery and repair.*

It is unquestioned American law that the actual facts existing **at the time of the abandonment** determine the right to abandon to underwriters. Petitioner recognized the principle (*brief, p.* 57-8), but proceeded immediately to include two salvage claims of $325,000 and $162,500 aggregating $487,500, *i.e.*, more than half its asserted expense total, which under the cases **can not be included** to establish a constructive total loss. *Church* v. *Marine Ins. Co.* (1817) F. Cas. 2711; 1 Mason 341, 343; *Humphreys* v. *Union Ins. Co.* (1824) F. Cas. 6871; 3 Mason 429.

In *Fireman's Fund Ins. Co.* v. *Globe Nav. Co.* (1916) 236 F. 618, involving a vessel *recovered by strangers before abandonment,* the Ninth Circuit said at pages 635-6:

> "The rule has relation to the high probability of a total loss of the property existing at the time the notice of abandonment is given, and not to the time the vessel was abandoned by the officers and crew on October 13th. * * * The vessel was rescued and towed into Astoria, October 15 * * *. The right of the appellee to abandon the vessel, if such right

> existed, must therefore be determined by the situation of the vessel and the conditions existing on Monday, October 16th, when the written notice of abandonment was given to the agent of appellant. At that time the vessel was afloat and riding safely at anchor * * *".

Similarly, when notice of abandonment of the *Portmar* was given on April 8, 1942 (R. 587-8), the vessel was afloat at Port Darwin (R. 733). Whether the *Portmar* could be floated, whether pumps or private salvors could be procured—those and related uncertainties had all been resolved and removed **before** the abandonment. They were no longer circumstances entitled to consideration under the "high probability" rule. *Under that rule* Captain Williams' lien for having raised the *Portmar* could not be considered in arriving at a figure that would constitute a constructive total loss.

Even if petitioner's fantastic salvage figures had been within reason, they would still have no place under the "high probability" rule.

(2) *Petitioner's fantastic salvage figures.*

Even if salvage services rendered prior to abandonment could be included as an expense, petitioner's figures are not entitled to any weight whatever. The salvage figures are the two *claims* for the **identical services**, £100,000 made by the Australian Salvage Board and £50,000 made by Captain Williams the private salvor (R. 692, 694-5). The Salvage Board described its claim as salvage with suitable assistance including towage to Brisbane (R. 634). That identical demand was specifically included in the stipulated $55,139 as "services and equipment * * * in raising her and taking her from Port Darwin to Brisbane" (R. 223). The Australian High Court's total award of

£5,000, *i.e.*, $20,008.59, was decreed to Captain Williams and his private company (R. 694-8). *The foregoing evidence completely disposes of the* (*£100,000*) *claim*—equivalent to $325,000.

The salved value was agreed to be £158,000 (R. 685), *i.e.*, $513,500. Petitioner's salvage figures (*brief, p.* 59) aggregate $487,500 equal to a salvage award of 93½%, where the material at risk was of trifling value (R. 697). The United States Government (R. 622) and petitioner (R. 64) both knew that the salvage demands were excessive. The master reported: "* * * to refloat the ship was no great feat in itself" (R. 610) and he, the chief engineer and the chief mate were all "of one opinion that it would not take much to raise her" (R. 425). The Australian High Court awarded £5,000 on the £150,000 salved value—just over 3%, including disbursements. Petitioner's proposed figure of $487,500 for salvage was and is utterly preposterous and far short of even the *slightest probability.*

This Court in *Bradlie* v. *Maryland Ins. Co.* (1838), 12 Pet. 378, affirmed the Circuit Court's disallowance of an abandonment under the 50% ("high probability") rule although the "first figure" of the salvage demand was 50% in addition to extensive repair. In the case of the *Portmar* the Australian salvage decree fixed the salvage expense at $20,008.59 (R. 597), and no larger figure can be considered.

b. Towage to Brisbane.

When petitioner was unable to prove the expense of towage from Darwin to Brisbane, respondents stipulated with petitioner:

> "* * * the reasonable cost of the services and equipment furnished the *Portmar* by Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130" (R. 223).

Petitioner now violates the stipulation by asserting that no wages, overhead or profits were included (*brief, p.* 59). The record and the stipulation are to the contrary showing that the $55,130 covered the Salvage Board £100,000 claim (R. 634) including wages and material, without any credit or allowance for the "pay load" of salt hides transported in No. 1 hold and coal in No. 2 hold from Darwin to Brisbane (R. 638, 644). Some of the items were duplicated in the cargo salvage claim (R. 698). The parties' stipulation is not a spring-board for further speculations and assumptions. *The Cockatoo* (1932, 2 Cir.) 61 F. 2d 889. The agreed "reasonable" towage and incidental expense, $55,130, is all-inclusive *as stipulated.*

c. Expense of Repair.

As early as May 26, 1942, while the *Portmar* was still at Darwin, petitioner's president planned a joint survey when the *Portmar* should arrive at Sydney (R. 617), and on October 24, 1942 the general counsel of the War Shipping Administration and petitioner's president planned a joint

> "full survey of the damage to the vessel • • • and of cost of repairing such damage so as to restore her to the condition at which she was at the time of her bombing. This survey, of course, shall be without prejudice as to whether the condition of the vessel at the time of bombing met the requirements of full classification" (R. 622-3).

All concerned parties were represented on that formal written survey (R. 65) which declared:

> "The cost of all damage repairs necessary to restore the *Portmar* to the condition she was in prior to being bombed in the Timor Sea and at Darwin in February 1942 would amount to approximately £28,000" (R. 651).

equivalent to $91,000 (R. 65). That joint survey report, not having been impeached, establishes the facts therein recited. *The Elmer A. Keeler* (1912, 2 Cir.) 194 F. 339, 341; *The Mason* (1918, 2 Cir.) 249 F. 718.

When it came to suit, petitioner produced an *ex parte* "owner's" classification survey (R. 642-9); in which *non-war-risk* items were included, *i.e.*, wear and tear such as worn out "cylinders and so forth" (R. 202). Neither in that report nor in the related letters was any separation of war damage items even mentioned (R. 629-631; 641-9) —a circumstance which was pointed out before the joint survey was held (R. 622-3). It was clearly understood on the trial that respondents withheld objection to the admission in evidence of the *ex parte* survey but were not to be bound by it (R. 173; 205-6). Only the fact that an *ex parte* survey had been made is in evidence, and not the statements therein. *Watson* v. *Insurance Co.* (1808) F. Cas. 17284; 2 Wash. C. C. 152; *Abbott* v. *Sebor* (1802) 3 Johns. Cas. (N. Y.) 39, 46-7; *Pennsylvania* v. *Downer* (1926, 2 Cir.) 11 F. 2d 466; *The Westchester* (1918, 2 Cir.) 254 F. 576.

Petitioner now complains that the joint survey, planned by it for the specific purpose of ascertaining the repair expense, in which it requested respondents to join, should be ignored for reasons based on assumptions and court colloquies but not on evidence (*brief, p.* 61). If the joint survey report was a hoax, why did not petitioner—with its *ex parte* survey in its hands—take prompt action in 1943 to correct any errors, instead of on the trial in 1951 when there could be no verification? Why did petitioner request respondents to join a survey which it urges now "is entitled to no weight whatever" because too remote in time? (*brief, p.* 61). The trial judge criticised the joint

survey because no "tenders" were sought and no specifications prepared (R. 739). That same criticism is equally applicable to the *ex parte* reports. Since there was agreement on the amount in the joint survey, there was no need of "tenders" or specifications. Whether the repairs were ever made or not is entirely immaterial. The formal joint survey finding ($91,000 for all repairs) is the only evidence of the expense of repair in the record.

Petitioner cites the "judgment" of the master and chief officer as to the possibility of salvage and the expense of recovery and repair. There is ample evidence of the master's competence and bravery, but his only qualifications in the record as a surveyor are

> "The main items, structural damage to her hull and damage to engine, boilers and auxiliaries, * * * Of the first you cannot on account of oil and dirt see anything to speak of yet * * * Of the second I do not feel competent to speak" (R. 638).

The chief mate's qualifications as a surveyor were:

> "* * * what little bit I know about it of the cost of shipyard repairs and cleaning ships and such as that * * *" (R. 507).

and, after return to the United States, the master announced *for the first time,* his "judgment" at "several times the value of the vessel" (R. 357-8). That sum would amount to at least twice $688,000. (R. 179) or $1,376,000. a figure hopelessly out of line. Because of petitioner's distorted picture, respondents are compelled to refer to other realities. The master never weighed at Darwin whether the *Portmar* was worth raising (R. 425), was not sure what his opinion was on March 3, changed his mind quite often, and thought the *Portmar* worth repairing except for war conditions and her position (R. 536-7). He never mentioned

salvage to the expert Williams at Darwin (R. 424), whom he saw almost daily on the *Portmar* from February 24 to March 2 (R. 729). He was not interested (R. 437), he never tried to get a survey at Darwin (R. 421) and his *only* written report *prior* to the salvage was: "EXCESSIVE DAMAGE MAKES SALVAGE IMPOSSIBLE" (R. 604). His formal protests contained not a word on the subject.

When he testified in 1945, he had to offer some justification—hence his "judgment". The vital test of "a considerate owner uninsured" (*Bradlie* v. *Maryland*, 12 Pet. 378, 398; *The Tornado*, 2 F. 2d 137, 141) the master utterly failed to meet.

B. The policy covenant.

The foregoing is the very sort of fantastic exaggeration the policy constructive total loss covenant was designed to obviate:

> "No recovery for a constructive total loss shall be had hereunder unless the expense of recovering and repairing the insured vessel shall exceed the insured value" (R. 71).

By the fourth paragraph of the "War Risk Clauses" (R. 71) the foregoing covenant was to apply only to claims arising from *physical damage* to the vessel. The *Portmar* claim arose entirely from physical damage. The cable instructions to Stephens "GIVE NOTICE ABANDONMENT * * * ACCOUNT DESTRUCTION PORTMAR" (R. 594) make that clear. The only reason the *Portmar* was compelled to be at Darwin until towed away, was physical damage, hence the above covenant or formula applies. Petitioner takes exception to the word "formula" as applied to the covenant. "Two times two are four", is as much a formula as the binomial theorem; and the plain English of the present covenant is as much a formula as the more com-

plicated clauses in *Searles* v. *Western A. Co.* (1906), 88 Miss. 260 and *Fireman's F. Ins. Co.* v. *Globe Nav. Co.* (1916, 9 Cir.), 236 F. 618. All clauses governing the right to abandon for constructive total loss have uniformly been given effect, superseding the "high probability" rule. *Columbian Ins. Co.* v. *Catlett* (1827), 12 Wheat. 383; *Wallace* v. *Thames & M. Ins. Co.* (1884), 22 F. 66; *Klein* v. *Globe & Rutgers F. Ins. Co.* (*The Tornado*) (1924, 3 Cir.), 2 F. 2d 137. The British Marine Insurance Act 1906, Sec. 60, cited by petitioner (*brief*, p. 57) specifically recognizes the validity of such provisions by the opening words: "*Subject to any express provision in the policy,*". Even covenants completely excluding constructive total losses are enforcible. *Burt* v. *Brewers' & Maltsters' Ins. Co.* (1876) 9 Hun 383, aff'd. (1879) 78 N. Y. 400; *Carr* v. *Security Ins. Co.* (1888) 109 N. Y. 504. The cases cited by petitioner (*brief, p.* 57, 62) are no exception and petitioner's characterization of them is clearly erroneous.

In *Orient Ins. Co.* v. *Adams* (1887) 123 U. S. 67, the policy contained two separate abandonment clauses. One clause precluded abandonment unless the injury equalled 50% of the insured value; the other, unless recovery and repair were "impracticable". This Court declined affirmance under the first clause but affirmed the Circuit Court under the second clause, saying at page 74:

> "The jury were distinctly told that the right to abandon depended upon the fact that it was impracticable to recover and repair the vessel".

In *Royal Exchange Assur.* v. *Graham & M. T. Co.* (1908, 7 Cir.) 166 F. 32, 36, the Court showed that the extent of damage satisfied both the "high probability" rule and the policy formula, and made the formula paramount when it significantly stated:

> "* * * but the right of abandonment depends *alone* upon the **fact** of such excess, * * *" (emphasis added).

In *Chicago S. S. Lines* v. *United States Lloyds Inc.* (1926, 7 Cir.) 12 F. 2d 733, the Circuit Court of Appeals did not pass upon the "high probability" rule, but denied recovery on the ground of unseaworthiness.

Klein v. *Globe & Rutgers F. Ins. Co.* (*The Tornado*) (1924, 3 Cir.) 2 F. 2d 137, the only reported decision on the present form of abandonment clause, is directly contrary to petitioner's assertion. The Court said:

> "Under above provision, if the *Tornado* could have been raised and repaired at a cost of less than $85,000. [the insured value], libelant had no right to claim a constructive total loss. * * * The testimony introduced in the instant case has convinced us that the libelant had no right, *under his contract,* to abandon the vessel to the respondent and recover for a constructive total loss. * * * but it must be remembered the existence of the **fact** that it [expense of recovery and repair] would so exceed the amount, constituting a constructive total loss, is the **criterion** of his right to abandon" (emphasis added) 2 F. 2d 141-2.

Mr. Justice Story's opinion in *Peele* v. *Merchants Ins. Co.* (1822) F. Cas. 10905; 3 Mason 27, cited and quoted by petitioner (*brief*, p. 55), did not involve any express covenant on the subject; nor did *Jeffcott* v. *Aetna Ins. Co.* (1942, 2 Cir.) 129 F. 2d 582.

Clearly the "formula" covenant supersedes the "high probability" rule. It is set forth as follows in *Appleman: Insurance Law and Practice*, (1942) Vol. 6, Sec. 3705:

> "Of course, the insured may not abandon under the high probability rule, where the policy fixes the right to abandon on certain specified terms."

In view of the foregoing, it is submitted that the "high probability rule" must yield completely to the policy formula; and that the District Court was in error in denying validity to the contract provision in the *Portmar* policies.

Petitioner asserts that "imminent peril of actual total loss" and "recovery and repair impossible" deny effect to the formula (*brief*, p. 54), but neither of the premises is correct.

The continuing imminent peril of Japanese attack in northern Australian waters affords no ground for abandonment, because *apprehension* alone is never a valid ground for abandonment. *Smith* v. *Universal Ins. Co.* (1821) 6 Wheat. 176, 185-7. But for the physical damage, the *Portmar* could have sailed away to Brisbane any night—just as she had originally sailed there in the face of expected Japanese attack.

Petitioner's alleged impossibility of recovery and repair is negated by the admitted fact that the *Portmar was* recovered and *was* repaired. Its claim on the ground that petitioner itself could not recover and repair and that the Government controls and priorities existed, is not supported by any citation and is indeed contrary to reported cases. *The Blairmore* (1898) A. C. 593, cited by petitioner, indicates that operation of natural causes or neutral persons or even underwriters acting fairly, may preclude claim of constructive total loss. In *Fireman's F. Ins. Co.* v. *Globe Nav. Co.* (1916, 9 Cir.) 236 F. 618 the vessel was salvaged by strangers. An owner cannot recapture his captured vessel, but its recapture by others before abandonment precludes constructive total loss. *Smith* v. *Uni-*

versal Ins. Co. (1821) 6 Wheat. 176; *Bainbridge* v. *Neilson* (1808, K. B.) 10 East 329; *Ruys* v. *Royal Ex. A. Co.* (1897) 2 Q. B. 135.

The high probability: Neither the District Court nor the petitioner has referred to two paramount factors in the high probabilities on April 8, 1942, namely: that the United States Army was desperate for ships, and that the energetic, resourceful Williams had a salvage lien to protect and collect. The master never weighed the probabilities at all beyond the obvious fact that she was damaged and aground, where, incidentally, she could have remained in practically the same condition for "a year or even longer" (R. 417, 443). The civilian Williams hired some privately owned pumps "valued at £1700" (R. 697) and floated the vessel in a few days (R. 689). No "reasonable calculations", as mentioned in *Bradlie* v. *Maryland*, 12 Pet. 378, were made by the master or anyone else at Darwin; and none of the "salvage" claims came to petitioner's notice until after August 19, 1942 (R. 634).

C. Total expense of recovery and repair.

The total expense of repair and recovery, as proven by the record are established by stipulation (R. 223), joint survey (R. 651) and court decree (R. 597). They aggregated $166,138.59 which is less than one-fifth of the expense necessary to permit abandonment of the *Portmar* as a constructive total loss. It is significant that the stipulated

sound value (R. 179)	$688,000
less "admitted" saived value (R. 685)	513,500
showed a loss of	$174,500

a figure very close to the proven expense of recovery and repair, $166,138.59, and to petitioner's estimate of $188,036.12 in the libel (R. 68).

The policy covenant superseded the "high probability" rule, and the expense of recovery and repair did not in

either case exceed the policy valuation. There was, therefore, no basis for declaring the *Portmar* a constructive total loss on April 8, 1942. What the *Portmar* may have been before the attempted abandonment, *i. e.*, on February 19, March 3, or March 10, 1942, has nothing whatever to do with the probabilities on April 8, 1942 when the *Portmar* had been floated and was able to carry a "pay load" when towed to Brisbane.

D. The invalid abandonment as a constructive total loss.

As demonstrated above, petitioner's attempted abandonment was obviously void, because the policies had expired before the loss was inflicted and also because the expense of recovery and repair was not great enough to warrant it, either under the covenant in the policies or under the "high probability" rule. Even if the factual background had permitted abandonment, there would be a much more serious consideration in the present matter, namely: the unqualified prohibitions of Sections 9 and 37 of the Shipping Act, 1916, which apparently void any transfer to the British respondents by abandonment or otherwise without previous approval of the Maritime Commission.

Section 9 of the statute provides for forfeiture of "any vessel or any interest therein owned * * * by a citizen of the United States and documented under the laws of the United States" "in any manner" transferred "to any person not a citizen of the United States" (46 U. S. C. 808). Section 37 declared that "when the United States is at war * * *, it shall be unlawful, without first obtaining the approval of the commission: * * * to * * * in any manner transfer * * * any vessel documented under the laws of the United States, or any interest therein, * * *" and declared any such transfer void (46 U. S. C. 835).

Abandonment was attempted on April 8, 1942 when the United States was at war. Respondents cannot agree with petitioner that there is no authority for the proposition, nor that the *Portmar* was a wreck on April 8, 1942, nor that the statute would not apply even if the *Portmar* had been a wreck.

The salved value in the Australian Court was fixed at $513,500 (R. 685). The *Portmar* was requisitioned for title as of November 17, 1942 at Brisbane under Section 902, Merchant Marine Act 1936, (R. 625), 46 U. S. C. 1242. More than ten years have passed since that time, but the United States has refused to pay any part of the "just compensation" provided for in the Act. If the attempted abandonment should be sustained there must be a *res judicata* to prevent circumvention of respondents' recoupment *pro tanto* (*i.e.*, to the extent at least of the $513,500) from the United States for its requisition of title to the *Portmar*.

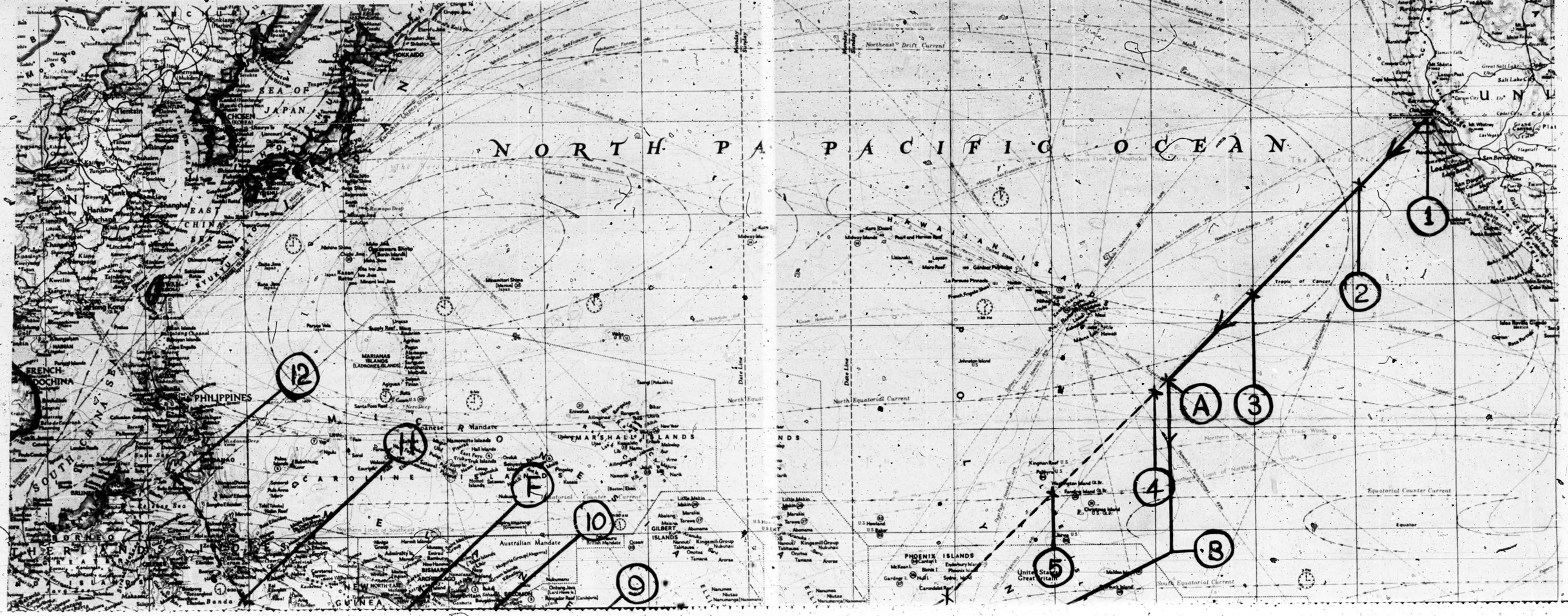
The District Court declined to rule on the matter, holding that there was a valid abandonment to respondents *without transfer of title* (R. 755). That holding contradicts the very essence of abandonment as a constructive total loss. Such abandonment must "put the underwriters completely in the place of the assured". *Chesapeake Ins. Co.* v. *Stark* (1810) 6 Cranch. 268, 272. It must operate, "in judgment of law, as a transfer of the property" *Walden* v. *Phoenix Ins. Co.*, 5 Johns. (N. Y.) 310, 324. As stated in petitioner's brief (pp. 73-4): "The assured must yield up to the underwriter all his right, title and interest in the subject insured". *Patapsco Ins. Co.* v. *Southgate* (1831) 5 Pet. 604, 622. Petitioner correctly informed the master by cable: "TITLE VESTED UNDERWRITERS IF ABANDONMENT GOOD OTHERWISE REMAINS IN OWNERS" (R. 613).

It is also requisite that petitioner be competent to transfer full title to respondents, and there can be no waiver with respect thereto. *Rice* v. *Homer* (1815) 12 Mass. 230, 235; *Williams* v. *Smith* (1804) 2 Cai. (N. Y.) 13, 23, Rev. other grounds (1806) 2 Cai. Cas. (N. Y.) 110; *Younger* v. *Gloucester Ins. Co.* (1855) F. Cas. 5487; 2 Curt. 322, 327.

> "A legal abandonment cannot be effected unless the person who assumes to make it has at the time of the loss the power to make a legal transfer of the property abandoned." *Murray* v. *Great W. Ins. Co.* (1893) 72 Hun. 282; aff'd 147 N. Y. 711.

The legal status of the parties after rejection of a *valid* abandonment is "*quasi* agent or trustee" *Walden* v. *Phoenix Ins. Co.* (1810) 5 Johns. (N. Y.) 310, 324; but such status has never been held to validate an invalid abandonment.

Petitioner (*brief*, pp. 74-5) attempts to differentiate among tender, offer and notice of abandonment. No such distinction is recognized by statute and cases cited by it. The expressions are used interchangeably. In this record, Mather cabled Stephens "GIVE NOTICE ABANDONMENT" (R. 594) and Stephens obeyed by writing: "We have been instructed by the assured to tender abandonment" (R. 587-8). Petitioner cabled its Australian lawyers: "GIVING UNDERWRITERS NOTICE ABANDONMENT PORTMAR" (R. 607). Even in its libel, petitioner pleaded: "Thomas Stephens & Sons, Ltd., gave notice of abandonment" (R. 61), and again: "the abandonment made as of that date to respondents was a valid abandonment" (R. 63). The District Court was misled by petitioner's overemphasis on the word "tender" in Stephens' letter and introduced a new feature in the law that the transfer of title by abandonment was a matter of "negotiations" which "never reached the point where a transfer of title was made" (R. 755). The cases all hold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HOKKAIDO
EAST CHINA SEA
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FRENCH INDOCHINA
SOUTH CHINA SEA
MARIANAS ISLANDS (LADRONES ISLANDS)
MARSHALL ISLANDS
CAROLINE ISLANDS
GILBERT ISLANDS
PHOENIX ISLANDS
HAWAIIAN ISLANDS
Australian Mandate
Northeast Drift Current
North Equatorial Current
Equatorial Counter Current
South Equatorial Current
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that the essence of abandonment is the entire and absolute transfer of unencumbered title. *Bidwell* v. *Northwestern Ins. Co.* (1859) 19 N. Y. 179, 181; *Patapsco Ins. Co.* v. *Southgate* (1831) 5 Pet. 604, 622.

FIFTH POINT.

There is no merit to petitioner's invocation of waiver and estoppel against respondents.

Petitioner urges that this Court bar all consideration of respondents' defenses except the point that the insurance had terminated prior to the damage, because of the wording of the respondents' declination of liability summarized in Stephens' letter (R. 590-1). That letter, of which petitioner quoted a part, clearly constitutes a denial of liability on all grounds of termination of the coverage, except possibly intentional exposure to risk, but even that is clearly implied. Obviously the letter made no reference whatever to the invalidity of the attempted abandonment, because the question of abandonment has no relation whatever to the question of liability but only to amount and procedure after the question of liability has been determined.

The rule of law in insurance cases is that waiver of defenses can be invoked against an insurer only if (1) the insurer had full knowledge of the facts when it denied liability, and (2) the assured has been prejudiced because it could have remedied the unassigned grounds of defense if it had known the insurer intended to rely thereon. The rule is based on the principle of estoppel.

> "The assured must, however, establish that the company had full knowledge of the facts before he can take advantage of the defense of waiver." *Foster* v. *Yorkshire Insurance Co., Ltd.* (1938) 255 App. Div. 829; 7 N. Y. Supp. 2d 79, at page 80. Citing cases.

The record in the present case shows the petitioner gave the respondents the most meager facts, and the respondents had no other source of information. It is indeed strange that petitioner should now assert that there was ample time for investigation and consideration, when the shipmaster, who was there in person, was not permitted full investigation.

> "As was said by Mr. Justice Field in *Insurance Co.* v. *Wolff*, 95 U. S. 326, above quoted, the doctrine of waiver is only another name for estoppel, and can only be invoked where the conduct of the company has been such as to induce action in reliance upon it." *Hubbard* v. *Mutual Reserve Fund Life Association* (1897 C. C. D. R. I.) 80 Fed. 681 at pages 685, 686.

To invoke the doctrine of waiver,

> "There must, in addition, be evidence from which a jury would be justified in finding that with full knowledge of the facts there was an intention to abandon, or not to insist upon the particular defense afterward relied upon, or that it was purposely concealed under circumstances calculated to, and which actually did, mislead the other party to his injury." *Devens* v. *Mechanics & Traders' Ins. Co.* (1880), 83 N. Y. 168 at page 173.

See also *Kerr* v. *Milwaukee Mechanics Insurance Co.* (1902 C. C. A. 8C), 117 Fed. 442, at page 445, and a full discussion of the law, with digest of many cases in *Taylor-Baldwin Co.* v. *Northwestern Fire & Marine Ins. Co.* (N. D. 1909), 20 Am. & Eng. Ann. Cases 432, and appended Note, pages 438, 439.

In all the insurance cases cited by petitioner on page 67 of its brief, there was full knowledge of the facts by the underwriter or a situation of prejudice to the assured. Neither factor existed in the case of the *Portmar*.

Finally, in *Royal Ins. Co.* v. *Martin* (1904), 192 U. S. 149, where the underwriter had denied liability on the ground that a fire loss had been caused by riot, an excepted peril, and the jury had given a verdict for the assured, this Court reversed on the ground that the Court below erred in not considering the evidence of change of ownership of the property, contrary to a provision in the policy, and said at page 167:

> "The case was not tried in accordance with a sound construction of the terms of the policy relating to the goods insured."

So in the case of the *Portmar,* even if the respondents' denial of liability had stated only the ground of termination of the insured venture (as erroneously claimed by the petitioner), and the Court should hold the insurance had not terminated, it must still consider and enforce all the terms and provisions of the policies.

Conclusion.

The decision herein of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, January 7, 1953.

Respectfully submitted,

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Of Counsel.

Appendix.

Photostatic Copy of Map, Petitioner's Exhibit 53, Showing the Originally Ordered Course of the *Portmar* (for the Philippines) in Dotted Line; and the Actual Movements of the *Portmar* in Solid Line.

(Opposite ☞)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,
Petitioner,

vs.

SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS and EDINBURGH ASSURANCE CO., LTD., *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REPLY TO UNITED STATES BRIEF AS *AMICUS CURIAE.*

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IN THE

Supreme Court of the United States.

OCTOBER TERM—1952.

No. 303.

CALMAR STEAMSHIP CORPORATION,

Petitioner,

against

SYDNEY KEITH SCOTT, one of the LLOYD'S UNDERWRITERS and EDINBURGH ASSURANCE CO., LTD., *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

RESPONDENTS' BRIEF IN REPLY TO UNITED STATES BRIEF AS *AMICUS CURIAE*.

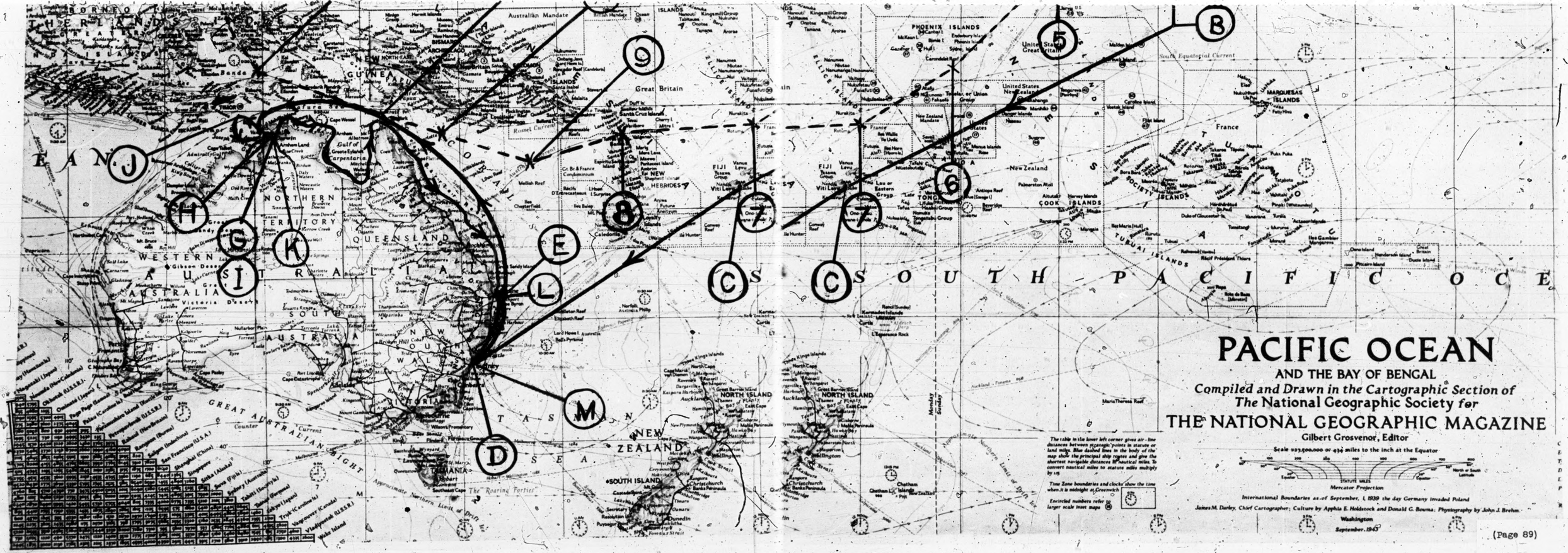
Statement.

Respondents find nothing in the brief of the United States as *amicus curiae*, that disposes of any of the issues of the present controversy. There are, however, factual inaccuracies, some of which require correction, and arguments or proposals which require analysis.

I. Factual corrections.

1. *Amendment of the insured voyage.*

The Government states that petitioner cabled respondents that the vessel was in Australia and requested she be


A U S T R A L I A
S O U T H P A C I F I C O C E A N
Great Britain
NEW ZEALAND
NORTH ISLAND
SOUTH ISLAND
TASMANIA
Australian Mandate
Gulf of Carpentaria
Great Australian Bight
The "Roaring Forties"
Approximate Northern Limit of Drift Ice
Roebuck Current
Counter Current
South Equatorial Current
Monsoon Drift
Northern Limit of Drift Ice
Tasman Sea
Coral Sea
Arafura Sea
Timor Sea
Banda Sea
Celebes Sea
Java Sea
Flores Sea
Northern Territory
Western Australia
South Australia
Queensland
New South Wales
Victoria
Tasmania
Fiji Islands
New Hebrides
Phoenix Islands
Marquesas Islands
Society Islands
Tuamotu Archipelago
Cook Islands
Tonga Islands
New Zealand
France
United States
New Zealand Mandate
Netherlands East Indies
Borneo
New Guinea
Australian Mandate
Solomon Islands
Caroline Islands
Gilbert Islands
Ellice Islands
Tuvalu
Samoa
Tokelau
Tubuai Islands
Pitcairn Island
Easter Island
Norfolk Island
Lord Howe I.
Kermadec Islands
Chatham Islands
Auckland Islands
Macquarie Island
Campbell Island
Antipodes Islands
Bounty Islands
Snares Islands
Solander Island
Stewart Island
Foveaux Strait
Cook Strait
Raoul (Sunday) I.
Curtis I.
L'Esperance Rock
Marie Theresa Reef
Minerva Reef
Penrhyn I.
Nassau I.
Suwarrow I.
Manihiki Group
Rakahanga (Humphrey)
Palmerston Atoll
Penrhyn Group
Danger Islands
Manihiki Group
Rakahanga (Humphrey)
Nassau I.
Suwarrow I.
Penrhyn I.
Danger Islands
Penrhyn Group

held covered pending further advices, and that respondents agreed to comply with this request and so notified petitioner by letter of February 6, 1942 (*brief, p.* 9). The record discloses, however, that despite the fact that on January 22, 1942 petitioner knew that the vessel had arrived at Darwin on January 19th (R. 143), *it did not so inform respondents* by its cable of January 24, 1942 (R. 586). Petitioner merely cabled:

> "*PORTMAR* DIVERTED TO AUSTRALIA ON OUTWARD VOYAGE UNDER GOVERNMENT ORDERS HOLD COVERED PENDING FURTHER ADVICES" (R. 586).

Respondents' agreement was reported by petitioner's London brokers:

> "to hold **this diversion** covered pending your further advices" (R. 593).

It was a *refusal* to cover the *Portmar* indefinitely and everywhere.

This factual inaccuracy is fully discussed in respondants' brief, pp. 20-2, 30-3.

2. *Reasonable value of raising and towing the Portmar.*

The United States (*brief, p.* 13) repeats earlier factual inaccuracies regarding the expenses of the Australian Government Salvage Board in connection with the salvage and towage of the *Portmar* (which for greater clarity we place in parallel columns), as follows:

Government's brief:	Stipulation in the record:
"The actual cost of the services and equipment furnished in raising and towing the *Portmar* was $55,130.00. The **reasonable** value of the services was much greater" (*brief, p.* 13).	"It is stipulated and agreed that the **reasonable** cost of the services and equipment furnished the *Portmar* by the Commonwealth Salvage Board in raising her and getting her from Port Darwin to Brisbane was $55,130.00" (R. 223).

The facts are analyzed in respondents' brief at pages 72-3.

3. *Total repair costs.*

In spite of the specific declaration of *"all damage repairs"*, in the joint survey the Government contends that the agreed total repair expense of $96,000.00 (R. 651) did not "purport to measure the extent of the damage suffered by the *Portmar*, since a large amount of repair work had already been done at Brisbane" (brief, p. 14). That is a completely erroneous inference, because the same signed survey report declared:

> "(a) In determining the above costs the accounts submitted by the United States Army have been examined and are considered reasonable under present conditions.
>
> "(b) The value of materials and supplies utilized in reconditioning the vessel and obtained from the S/S *Rufus King* is—as shown in attached statement —3170.17.3" (R. 652).

and the "work carried out at Brisbane" is listed in detail as the first twenty items of the signed summary attached to the survey (R. 654).

II. The Government's alleged interest in this case No. 303.

The assertion that the Government is financially interested in the outcome of the present case is shown to be erroneous at pages 5 and 6 of respondents' brief. The Government is liable in any event—either to petitioner directly or to respondents by subrogation, even as to the as-yet-unpaid "just compensation" for requisition of title to the *Portmar*.

As to the Government's interest in the nature and extent of insurance, the facts established by the present record and the resulting issues do not constitute an appropriate vehicle to test out the Government's discussions. The extensive comparisons between the nature and essence of "charter parties" and "insurance policies", are beside the point. The Court of Appeals understood the many obvious differences between charters and insurance policies, and merely regarded exclusions of restraint in charters as fairly analogous to similar exclusions in insurance.

The repeated suggestion that the decision of the Court of Appeals might have a deterring effect on shipowners' willingness to cooperate in the event of another war does scant justice to the patriotism of American shipowners and masters. The present suit is purely of financial motivation. There is no suggestion that the Army did any wrong in taking over the *Portmar* at Suva and thereafter. On the contrary, what the Army did was appropriately done to win the war. That purpose was paramount, it was for the *public* weal. The sacrifice of the *Portmar*, therefore, should be borne as a *public* charge—not charged to petitioner because it happened to own the vessel, nor to respondents whose policy conditions were carefully circumscribed by the Maritime Commission to exclude all restraints by the United States Army.

III. The "discussions" in the Government's brief as *amicus curiae*.

The matters discussed in the Government's brief purport to be based upon some of the incidents appearing in the present record, but they are unrelated to the issues involved. Limitations of time and space preclude an analysis of the more than 80 citations.

Some of the propositions set forth in the brief, however, require comment:

1—*The "Free of British Capture" rider:*

The Government refers to the "Free of British Capture" rider (pp. 24, 25), but nowhere mentions the first part of the rider, analysis of which would supply a complete answer to most of the questions the brief raises. This Court, in *Standard Oil Co.* v. *United States*, (*The Llama*) (1925), 267 U. S. 76 definitely established the American law that *full* war risk coverage insures against all losses that follow in the wake of Governmental restraint. If the *Portmar* policies had not included the "Free of British Capture" rider, all that happened to the *Portmar* after the first Governmental restraint (at or prior to Suva) would have been covered. But the first part of that rider was an unqualified exclusion of all Allied restraints, as shown in respondents' brief (pp. 22-26), and all such restraints were thereby assumed by petitioner.

As suggested by the Government as to deviation cases, "the underwriter's liability for a subsequent loss is to be determined by reference to the terms of the policy" (*brief, p.* 40), is equally applicable to every possible liability of respondents. In a footnote (p. 24), the Government refers to the records of the American Institute of Marine Underwriters. Those original records are in the appeal record

(R. 671-684). They show that Mr. B. K. Ogden attended on those deliberations, as a representative of the U. S. Maritime Commission (R. 674).

The *Portmar* Charter Party was drafted by the Government (R. 159-160), required a specific form of war risk coverage (R. 35), and the coverage was approved by the same Mr. B. K. Ogden, Director, Division of Insurance for the Maritime Commission (R. 602). The Government's present discourse on "the burden of uncertainty" (pp. 23, 24, 37, 39, 56, 57), what should or should not have been covered, how much of each risk should now be allocated to petitioner or to respondents, and what additional time petitioner should be allowed to reinsure after policy termination, relates to contingencies established and fixed by the contract terms. Those terms had been prescribed by the Insurance Department of the Maritime Commission under Mr. Ogden, its representative on the body which prepared the "Free of British Capture" clause "* * * which covers while being detained for inspection by the British, * * *" (R. 674). It does not lie with the Government to question that action or language which its representative knew and participated in, twenty-two months before the *Portmar* policies were written.

The Government's footnote (p. 24) refers to the language of the Institute (R. 674), Mr. Winter's language on that point was:

> "But it was always within the framework of that voyage, of that particular incident of the voyage." (R. 251).

The rights and obligations of the petitioner and the respondents are derived from the terms and conditions of the policies—not on economic considerations. This Court has on innumerable occasions stated that basic principle.

One such statement that clearly announces it is in *Imperial Fire Ins. Co.* v. *Coos County* (1893), 151 U. S. 452, 462, as follows:

> "Contracts of insurance are contracts of indemnity upon the terms and conditions specified in the policy or policies, embodying the agreement of the parties. For a comparatively small consideration the insurer undertakes to guaranty the insured against loss or damage, upon the terms and conditions agreed upon, and upon no other, and when called upon to pay, in case of loss, the insurer, therefore, may justly insist upon the fulfillment of these terms. If the insured cannot bring himself within the conditions of the policy, he is not entitled to recover for the loss. * * * The courts may not make a contract for the parties. Their function and duty consist simply in enforcing and carrying out the one actually made."

The entire "Free of British Capture" rider is analyzed in respondents' brief at pages 22 to 26, and 33 to 45.

2—*The existence and items of the* Portmar *charter party are entirely irrelevant and immaterial.*

The Government does not base its discussion on the "insured voyage" which alone concerns respondents, but on the "charter period" (*brief, p.* 18), "latitude permitted by the charter" (*brief, p.* 21) and similar "charter" references (*brief, pp.* 41, 42, 47).

As to respondents, the charter incidents are entirely *"res inter alios acta"*. The charter party and the Government as charterer are complete strangers to the insurance policies, as shown in respondents' brief (*pp.* 56-58). *Hughes* v. *The Union Insurance Company of Baltimore* (1823) 8 Wheat. 294, 306-307.

3. *The termination of the insured voyage and, therefore, the insurance policies.*

The Government is clearly in error in its assumption that the District Court made no finding that the insured voyage had terminated. We quote the District Court's finding:

> "It was the act of paramount power which *prevented the homeward voyage* and sent the *Portmar* on to Timor" (R. 747).

As shown in respondents' brief (*pp.* 8 to 23) the Court of Appeals correctly held that the "insured voyage" had come to an end before the loss occurred (R. 793), and the risk of restraint was excluded from the coverage, and was assumed by the petitioner itself. (*The Ada*, 241 N. Y. 197, 211; *Speyer* v. *New York Ins. Co.*, 3 Johns. (N. Y.) 88; *Graham* v. *Pennsylvania Ins. Co.*, F. Cas. 5674, 2 Wash. C. C. 113, 130; *Dole* v. *New England M. M. Ins. Co.*, 2 Clif. 394, 415). As a consequence of the insured voyage being broken up by an uninsured peril, it followed as a matter of law that the policy was terminated, for it is impossible to reconcile a continuance of liability under an insurance contract when the vessel is no longer within the contract limits. *The Ada* (1925) 241 N. Y. 197. Neither *The Llama* (267 U. S. 76) nor *The Rickards* case [1942] A. C. 50, casts any doubt upon that proposition, because in both cases the restraint which caused the loss had already occurred on the "insured voyage". If the risk of restraint had been excluded in those cases (as it was in the *Portmar* policies), there could have been no recovery.

The Government's assumption that restraint of princes is not a risk at all (*brief, pp.* 20, 40) is entirely erroneous. It is the heart of every Capture, Seizure and Restraint risk.

Conclusion.

The decision herein of the United States Court of Appeals for the Second Circuit should be affirmed.

Dated: New York, New York, January 14, 1953.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents,
27 William Street,
New York 5, New York.

WALTER B. HALL,
WILBUR H. HECHT,
Of Counsel.

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Respondents.

ON PETITION FOR REHEARING ON THE MERITS.

RUSSELL T. MOUNT,
Counsel for Respondents.

WALTER B. HALL,
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Respondents.

ON PETITION FOR REHEARING ON THE MERITS.

Respondents, Sydney Keith Scott, one of the Lloyd's Underwriters, and Edinburgh Assurance Co., Ltd., *et al.*, present this petition for a rehearing, and, in support thereof, respectfully show:

I.

The prevailing opinion of this Court has held that the insured voyage of the *Portmar* was not frustrated or terminated prior to the damage sustained by her on February 16 and 19, 1942, on the ground that "It is not maintained, nor could it be, that an explicit decision, objectively provable, not to allow the *Portmar* to continue on her voyage was ever reached by the authorities" (Opinion, p. 12), and that coverage cannot end "before an unambiguous, objectively provable decision has been made by the requisitioning sovereign to cause abandonment of the voyage" (Opinion, p. 17).

In *Borup* v. *Western Operating Corporation* (1942, 2 Cir.), 130 F. (2) 381; cert. denied 317 U. S. 672; *The Claveresk* (1920, 2 Cir.), 264 F. 276; *Allanwilde Corporation* v. *Vacuum Oil Co.* (1918), 248 U. S. 377; *Texas Company* v. *Hogarth Shipping Company* (1921), 256 U. S. 619; *Hirgi Mulji* v. *Cheong Yue Steamship Co., Ltd.* (1926), A. C. 497; and *Speyer* v. *New York Insurance Co.* (1808), 3 Johns (N. Y.) 88; discussed at pages 15-18 of our brief in this Court, there was a formal Government prohibition, or requisition of use. But in *Horlock* v. *Real* (1916) 1 A. C. 486 (Brief, p. 15) there was merely the German Government's physical detention of the vessel *in fact;* and the *ratio decidendi* of all of the above cases was that there had been *in fact* a restraint or requisition by Government, which was of *indefinite duration.*

In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ltd.; supra,* Lord Sumner, writing for the Judicial Committee of the Privy Council said at pages 506, 507:

> "That requisition, or at any rate requisition for so long as showed that it was to endure *for a considerable though indefinite time* (whichever be regarded, in fact, as the event defeating the adventure), *of itself terminates the charter and all its parts, as soon as it happened,* is a conclusion, which though warranted and binding in view of these and other passages, does not depend merely on the language, which a long sequence of the highest authorities have happened to use. It rests on principle, and is the only way of reconciling the special rule as to frustration with the general rules as to the obligation of contracts." (Italics ours.)

And again at page 509:

> "Evidently, therefore, whatever the consequences of the frustration may be upon the conduct of the parties, *its legal effect does not depend on their*

> *intention, or their opinions, or even knowledge, as to the event,* which has brought this about, *but on its occurrence* under such circumstances as show it to be inconsistent with further prosecution of the adventure." (Italics ours.)

In *Allanwilde Corporation* v. *Vacuum Oil Co., supra,* this Court said:

> "The duration (of the embargo against sailing vessels) was of indefinite extent. Necessarily, the embargo would be continued as long as the cause of its imposition—that is, the submarine menace—and that, as far as then could be inferred, would be the duration of the war, of which there could be no estimate or reliable speculation. The condition was, therefore, so far permanent as naturally and justifiably to determine business judgment and action depending upon it. *The Kronprinzessin Cecilie,* 244 U. S. 12."

In the present case, both the District Court and the Court of Appeals found as *a fact* that the insured voyage of the *Portmar* had been terminated. The District Court found that the Army had taken over the *Portmar* completely for war purposes (R. 718), and "It was the act of paramount power which prevented the homeward voyage and sent the *Portmar* on to Timor" (R. 747).

The Court of Appeals likewise found that the *Portmar* had been taken over by the United States Army at Brisbane January 5, 1942, and that this had "put an end to the possibility of that return voyage for which alone the Underwriters meant to insure her" (R. 794) and held:

> "We hold that the voyage ended at Brisbane and that the policy then ceased to cover the ship" (R. 802).

In his opening statement to the District Court the United States Attorney, after describing the desperate plight of the Allies in Australia, continued:

> "and the military at that time was controlling every vessel, every cargo, every piece of equipment that had value whatsoever in a military sense with a view to using it for military purposes as military necessity dictated" (R. 101).

Colonel Plant, the United States Army's Chief of Water Transportation in the Southwest Pacific Area, testified to the facts (R. 183-188), on which the Government's opening statement was based. Without restating his testimony, it was epitomized in the following:

> "Q. What vessels did you exercise control with respect to? A. Every vessel we could get our hands on" (R. 186).

and

> "In the meantime, we were looking around desperately for anything that was afloat or could be made to float" (R. 187).

As this Court pointed out, from December 11, 1941, on, the *Portmar's* "every movement was in obedience to orders issued by competent United States and Australian authorities", and that she was "subject to these orders." (Opinion p. 2). The prevailing opinion of this Court does not mention the fact that at Brisbane, January 5-9, 1942, some new cargo was put aboard by the Army (R. 285, 286, 793, 794), making it a new and different venture from that point on.

In view of the line of Court decisions above referred to, the undisputed testimony of Colonel Plant, and the Finding of Fact by both the District Court and the Court of Appeals that the return voyage had been prevented, the

respondents respectfully but urgently request an opportunity to argue the termination of the insured voyage for the reconsideration of this Court. The point is of great importance for the future, inasmuch as a sudden outbreak of war, or even threat of war, will certainly result in many such requisitions of American vessels by Army officers in various points throughout the world.

The prevailing opinion of this Court has made an "unambiguous objectively provable decision * * * by the requisitioning sovereign", a requisite to a finding of frustration or termination of voyage (Opinion p. 17). We respectfully submit that such a holding reverses what the law has been, certainly since *Horlock* v. *Beal,* 1916, when the House of Lords held that a frustration or termination of voyage results in law from a restraint or requisition *in fact,* provided it be of indefinite duration. This distinction was not raised by the petitioner, nor argued in any court in this case.

II.

The prevailing opinion of this Court has held that although the first half of the Free of British Capture clause or rider is an absolute warranty against Allied restraint or requisition, the second half of the clause (appearing for the first time in January 1940) reinstates insurance against Allied restraint or requisition.

The entire clause, printed at pp. 33, 34 of our brief, reads as follows:

> "Notwithstanding anything to the contrary contained in this policy, it is understood and agreed that this insurance is warranted free of claims arising from Capture, Seizure, Arrest, Restraint, Detainment, Requisition, Nationalization or Condemnation by or under the authority of the government of Great

> Britain or any of its dominions, colonies, possessions or allies, or by any forces acting in cooperation with or under the control of them or any of them; but unless the insured Vessel is condemned this warranty shall not exclude losses **otherwise covered by this policy** which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision, provided such losses would not be covered by a marine insurance policy (in the form hereto attached) warranted free of claims arising from Capture, Seizure, or Detention. B. C. 2." (Emphasis ours.)

The clause is a clause paramount: "Notwithstanding anything to the contrary, etc." The first half of the clause is an unqualified warranty against Allied restraint, detainment, requisition, etc. In the second half, which makes certain exceptions to the absolute warranty of exclusion, this Court has read, "otherwise covered by this policy" as referring to the *causes of loss* enumerated in the general war-risk rider of the policies. We point out, however, that the causes of loss applicable to the Free of British Capture rider are specifically enumerated in the rider itself as those "which are caused by gunfire, torpedoes, bombs, mines or other implements of war, or by stranding, sinking, burning or collision". The list of causes of loss applicable to the Free of British Capture rider thus includes *marine* perils which are not named in, or covered by any other part of the policies.

With all deference, we submit that the words "otherwise covered by this policy" obviously do not refer to *causes of loss* such as bombs, etc., but to time, place, commercial use of the vessel, connection with the insured voyage, etc., i.e., circumstances which, *absent the requisition*, would bring the loss (if caused by one of the enumerated *causes* of loss) within the four corners of the policy.

The first half of the clause having excluded Allied restraint or requisition, the words "otherwise covered by this policy" obviously mean "in other respects" (Dictionary definitions, our brief, p. 35) than restraint or requisition. The prevailing opinion holds that Allied restraint or requisition is *included* under the word *"otherwise"*.

The final words, "provided such losses would not be covered by a marine insurance policy, etc." obviously mean merely that these underwriters are not liable for a loss if it is covered by a marine insurance policy.

If the wording of the second half of the Free of British Capture clause means that loss while under requisition is otherwise covered by the policy (Opinion, p. 7), then the *entire* Free of British Capture rider was useless, except for the provision excluding all losses if "the insured Vessel is condemned". That would have been stated in a single sentence.

The meaning which underwriters claim for the Free of British Capture clause is that stated in the original records of the American Marine Hull Insurance Syndicate (comprising about 80 insurance companies, R. 229), which formulated and promulgated the clause, first as to cargo (R. 241-2, 682), and then in January, 1940, as to hull, as discussed on pp. 42, 43 of our brief. The original record of the American Syndicate (Underwriters' Exhibit 4, R. 673-675) referring to the hull clause, describes it as "to conform with change made in the same clause of the Cargo War Risk Clauses, which covers while being detained for inspection by the British" (R. 674. See also Underwriters' Exhibit 3, R. 671).

This likewise was the testimony of Mr. William D. Winter, outstanding American authority on marine insurance, who has been in the insurance business for more than forty-nine years (R. 239), who had participated in framing

the clause (R. 673), and whose company has no financial interest in the outcome of this suit (R. 239).

With all deference, we submit that the prevailing opinion of this Court has not considered the history, origin and purpose of the second half of the clause, as established by those who are constantly engaged in the insurance business. *Williston on Contracts* (1936 Ed.) Secs. 618, 629; *Restatement of the Law, Contracts,* Sec. 230; *Connecticut Fire Insurance Co.* v. *Davison Chemical Corporation* (1944 D. C. D. M. D.) 54 F. Supp. 2; *Metropolitan Exhibition Co.* v. *Ewing* (1890 C. C. S. D. N. Y.) 42 F. 198; *Calbreath* v. *Gracy* (1805) F. Cas. 2296; 1 Wash. C. C. 219, 220, discussed at p. 42 of our brief.

The prevailing opinion seems to be based in the final analysis on the ground that a policy having the second half of the Free of British Capture clause gives only slightly greater coverage (according to underwriters' contention) than a policy having only the first half of that clause (Opinion, pp. 14, 15). This point was not raised by the petitioner, nor argued in any court in this case.

We point out that insurance is not an agreement to pay for all losses. It is an agreement to pay for losses (1) only from certain enumerated causes and (2) only then under certain (not all) conditions or circumstances. The *Portmar* loss was from one of the causes enumerated in the second half of the Free of British Capture clause, but it was not under the conditions required by that clause as to time, place, or circumstances, including commercial use of the Vessel.

Conclusion.

It is most respectfully but urgently prayed that this Court allow to the respondents a rehearing limited to the two specific points above set forth.

Respectfully submitted,

RUSSELL T. MOUNT,
Counsel for Respondents.

WALTER B. HALL,
WILBUR H. HECHT,
Of Counsel.

Certificate of Counsel.

I, RUSSELL T. MOUNT, counsel for the above named respondents, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RUSSELL T. MOUNT,
Counsel for Respondents.